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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MIDWEST COMMUNICATIONS, INC.,

Petitioner,

v.

MINNESOTA TWINS, INC.; NORTHSTAR HOCKEY PARTNERSHIP; TWINSTAR ENTERPRISES, A GENERAL PARTNERSHIP; MINNESOTA SUBSCRIPTION TELEVISION, INC., D/B/A SPECTRUM; AND SPORTS CHANNEL, A MINNESOTA JOINT VENTURE;

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LEON RAYMOND GOODRICH
(Counsel of Record)
BRADLEY G. CLARY
MARKO J. MRKONICH
OPPENHEIMER WOLFF FOSTER
SHEPARD AND DONNELLY
1700 First Bank Building
Saint Paul, Minnesota 55101
(612) 227-7271
Counsel for Petitioner
Midwest Communications, Inc.

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QUESTIONS PRESENTED

1. Does the requirement in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) that a plaintiff have "antitrust injury" for standing to recover damages in an antitrust suit under Section 4 of the Clayton Act apply equally to entitlement to *injunctive* relief under Section 16 of the Clayton Act?

2. Is the requirement of standing for *injunctive* relief under Section 16 of the Clayton Act satisfied as a matter of law in this case where a customer has proven, to a jury, a continuing pooling and tying agreement in violation of Section 1 of the Sherman Act entered into by the suppliers in the market in which the customer seeks to purchase?

3. Does a potential purchaser who has been injured by reason of the operation of a tying agreement that violates Section 1 of the Sherman Act lack antitrust standing, as a matter of law, to recover *damages* for its injury because it made no actual purchase?[1]

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[1] Pursuant to Supreme Court Rule 28.1, petitioner, Midwest Communications, Inc. (now known as Midwest Communications Operating Company), states that its parent company is MTC Properties, Inc. (now known as Midwest Communications, Inc.), and that it has no subsidiaries (excluding wholly owned subsidiaries) or affiliates, except that one subsidiary has an interest in Satellite Music Network, Inc. and another subsidiary is a partner in Satellite Radio Network Partnership.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Midwest Communications, Inc. ("WCCO") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on December 12, 1985, which affirmed the orders of the United States District Court for the District of Minnesota granting respondents' post trial motions notwithstanding a jury verdict finding they had violated the antitrust laws.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reproduced as Appendix A at A-1 - A-24, is reported at 779 F.2d 444. The opinions of the United States District Court for the District of Minnesota, entered on September 13, 1983, and March 30, 1984, not reported, are reproduced as Appendix B and Appendix C respectively, at A-25 - A-28 and A-29 - A-46. The jury verdict finding that respondents had violated the antitrust laws is reproduced as Appendix D, at A-47 - A-54.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1985. A timely petition for rehearing and request for rehearing *en banc* was denied by an order dated January 16, 1986, reproduced as Appendix E at A-55, and this petition for certiorari is filed within 90 days of that date. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

Sherman Act Section 1, 15 U.S.C. §1 (1982), is reproduced as Appendix F at A-56. The relevant portion of Section 4 of the Clayton Act, 15 U.S.C. §15 (1982), is reproduced as Appendix G at A-57. Section 16 of the Clayton Act, 15 U.S.C. §26 (1982), is reproduced as Appendix H at A-58.

STATEMENT OF THE CASE

This case arises from the efforts of the only two professional sports teams in the relevant market to control jointly the separate telecast rights of each. App. A-47 - A-48. This case concerns an anticompetitive pooling and tying agreement for the sale of telecast rights entered into by those two professional sports team respondents, the Minnesota Twins, Inc. ("Twins") and the North Star Hockey Partnership ("North Stars").

The Twins and the North Stars are major league professional baseball and hockey teams, respectively, based in Minneapolis-Saint Paul, Minnesota, and offering for sale the rights to telecast their games. WCCO, a locally owned entity, is the CBS network affiliate in Minneapolis-Saint Paul. WCCO is engaged in the business of production and distribution of television and radio programming, including programming for pay television. Its Midwest Cable and Satellite subsidiary was formed to develop business in the cable and satellite television area, including distribution for pay television of sports broadcasts. It has its own satellite uplink earth station. The equipment and installation of that facility alone cost approximately one million dollars. Sports broadcasting is a significant dimension of WCCO's programming and image. (Testimony of W. Thomas Doar, Chairman of the Board of WCCO, pp. 3-33; Eighth Circuit Appendix (hereafter "8th A") 8th A859-889.)

The Twins and North Stars are separately owned and managed entities. Historically, the Twins and North Stars have each marketed their telecast rights separately, with neither having input into the marketing or pricing decisions of the other. By letter of July 29, 1981, and "Deal Points" of September 22, 1982, however, the teams recorded an agreement contemplating assignment of the telecast rights to Twins and North Stars home and away games to defendant TwinStar, an

entity jointly owned and controlled by the Twins and North Stars. The important features of the combination, lasting until the year 2002, as identified in the Deal Points, are:

1. TwinStar has exclusive telecast rights
2. for free and pay television
3. to all home and away games (subject to league commitments)
4. of both the Twins and the North Stars
5. for 20 years.

The agreement calls for the equal sharing of profits and losses from the distribution of telecast rights between the two teams. The teams promise to agree on the identity of any rights purchaser and the price to be charged to that purchaser for the rights of either team. This pooling agreement, therefore, includes not only a group boycott but also horizontal price-fixing.

One of the express purposes and effects of the TwinStar combination is to prevent the Twins and North Stars from competing against each other in the sale of telecast rights. The teams feared that if they were on separate pay television channels they would divide the market; either or both teams might wind up with a smaller pot of money from sale of telecast rights than if the teams formed TwinStar to market together. (Testimony of Kenath "Skip" Sponsel, North Stars consultant, Vol. I, pp. 38-39, 8th A1205-1206). The teams felt they could better negotiate deals if all potential rights purchasers recognized there was only one negotiating entity for both teams. (Sponsel, Vol. II, pp. 13-15, 8th A1220-1222). The teams believed long term sharing of revenues was important so that if one team was doing well on the playing field at a given time and the other was not, broadcasters could not go to the weaker team and insist on a lower purchase price for that team's telecast rights. (Sponsel, Vol. I, pp. 44-45, 8th A1211-1212; Testimony

of John Karr, President of the North Stars, Vol. II, pp. 7-8, 8th A975-976). The teams included within the pooling agreement rights to free television as well as pay, to control all marketing of their telecast rights. (Sponsel, Vol. II, pp. 16, 19, 8th A1223, 1225).

In addition, it was a condition imposed by the teams that to obtain pay telecast rights for one team, a purchaser had to obtain the pay telecast rights for the other team. This condition was made clear in 1982 by the teams both to a potential customer interested in obtaining North Star telecast rights, Movie Systems, Inc., and to WCCO, when it initially inquired about purchasing Twins telecast rights. (Testimony of Curtis Bradley, President of Movie Systems, Inc., pp. 11, 14, 30, 31, 8th A739-742; Testimony of James Rupp, President of WCCO, Vol. I, pp. 6, 63, 8th A1140-1141; Vol. III, p. 197, 8th A1150). This condition was also the single most important reason that the Twins gave for rejecting an October, 1982 bid by WCCO and Midwest Federal, a Twin Cities based savings and loan association, to purchase the pay telecast rights to Twins games only. (Pl. Exh. 146 at p. 2, 8th A570).

In sum, after agreeing to pool the sale of *all* their telecast rights and to tie the sale of their pay telecast rights in one package, the Twins and North Stars jointly solicited bids for their pay telecast rights. Pursuant to the conspiracy, the exclusive right to televise Twins and North Stars home games for pay was given to defendant Spectrum in the fall of 1982. The agreement with Spectrum was to last for eight years. But, in the fall of 1985, Spectrum ceased operating pay television generally and stopped offering pay telecasts for Twins and North Stars games in particular. However, the TwinStar conspiracy between the Twins and North Stars remains, and the teams, through TwinStar, will once again embark upon the joint marketing of their pay telecast rights.

As a result of this illegal agreement and its unreasonable restraint of trade, WCCO filed suit under Section 1 of the Sherman Act (15 U.S.C. §1), Sections 4, 12, and 16 of the Clayton Act (15 U.S.C. §§15, 22, and 26) and 28 U.S.C. §1337. With the agreement of the parties, the Court ordered a bifurcated trial. The matter then proceeded to a jury trial on liability issues only in June of 1983. After a trial extending over two months, the jury found for WCCO on both the pooling and the tying violations. Appendix D. The pooling was submitted on rule of reason instructions requiring WCCO to show the practice was an unreasonable restraint on competition. With respect to the pooling claim, the jury found that the Twins and North Stars competed in the same relevant market in the sale of telecast rights (indeed, were the only two competitors in that market), and had entered a conspiracy in unreasonable restraint of trade. The jury declined to find that WCCO, to that point in time, had already been injured in its business or property by that unreasonable restraint of trade. Appendix D, A-47 - A-48.

With respect to the tying claim, the jury found that the Twins and North Stars had entered into an unlawful conspiracy to require a buyer of one team's telecast rights to purchase the rights of the other, and that WCCO had already been injured in its business or property by the tying. The jury expressly found that no compelling business justification existed for the tying of Twins and North Stars telecast rights. Appendix D, A-48 - A-49.

The District Court did not disagree with the jury's findings as to the existence of pooling and tying violations. However, based on the jury finding of lack of actual injury to WCCO from the pooling violation as of the time of trial, the District Court denied WCCO all claims for both damages and injunc-

tive relief on the pooling violation, which may continue now until the year 2002.

With respect to the tying violation, the District Court initially granted injunctive relief to WCCO, and ordered the parties to advise the court concerning scheduling a damages trial. The Court then reversed itself on March 30, 1984, and dismissed the tying claims, holding that only an actual purchaser had standing to obtain damages relief. The Court held that WCCO could not seek damages because they would be "duplicative" and "speculative", without giving WCCO any opportunity to prove its damages at trial or make any submission to the Court concerning them. WCCO's injunctive claim also was dismissed for an alleged lack of standing.

WCCO appealed to the Eighth Circuit, raising these and other issues. With respect to the matters raised in this petition, the December 12, 1985, panel decision of the Eighth Circuit ("Opinion") essentially accepted the approach of the District Court. The Opinion stated that WCCO lacked standing to pursue either the damages or injunctive claims on either the pooling or tying violations. With respect to the tying *damages* claim, the Opinion held that because it was not an actual purchaser, WCCO could not show the requisite "antitrust injury" under the standard set forth in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). This ruling was made despite the jury verdict finding that WCCO had been injured as a result of the tying violation and despite WCCO having had no opportunity to present its case on amount of damages because of the bifurcation.[2] Opinion, Appendix A, A-11 - A-15.

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[2] With respect to the pooling damages claim, the Opinion relied on the jury finding as to injury and stated that WCCO had no standing to assert a damages claim for pooling. Opinion, A-15. Although WCCO respectfully disagrees with that reasoning and result, that matter is not raised in this petition.

On the injunctive relief claims, the Opinion applied the same *Brunswick* standard for antitrust injury that governs damages relief under the antitrust laws and found WCCO did not have standing to pursue injunctive relief as to either tying or pooling. Opinion, A-16 - A-18. The Opinion also found that because WCCO had not objected to the absence of a jury "instruction" on the equitable issue of threatened injury, WCCO could not seek equitable relief. Opinion, A-17 - A-18.

These court rulings of lack of actual and threatened injury to WCCO from the teams' unlawful agreement were made in the face of a trial record amply showing injury. The respondent teams, WCCO's expert economist (Louis Guth), and the District Court all agreed that anticompetitive injury by increasing prices to customers such as WCCO for the teams telecast rights or by tying, was the intended result of respondents' conspiracy.

The facts in the record are that each time WCCO, or another customer, seeks to purchase telecast rights from the Twins and North Stars up to the year 2002, it will be threatened with injury, and that injury will be the proximate result of the unlawful pooling conspiracy which is simply a form of agreement between competitors not to compete—a garden variety antitrust violation. For example, WCCO will be asked to pay a price inflated by price fixing by competitors, or the competitors may agree not to sell to WCCO—in other words, agree to boycott WCCO. (Guth, Vol. I, pp. 40-43, 8th A930-933). "[T]he practical effect of this agreement is to result in the joint fixing of prices by the two major competitors in the market, really the two teams with important telecast rights to be sold for home team telecast coverage in the geographic areas identified. This includes not only the ability to fix prices, but also to refuse to deal with or to entertain offers from some competitors

and deal favorably with other competitors." (Guth, Vol. I, pp. 40-41, 8th A930-931). The agreement poses a significant block to competition at the very time when there might be many different alternatives explored regarding the delivery of pay television services. (Guth, Vol. I, p. 43, 8th A933).

The District Court, in its initial September 13, 1983 opinion granting WCCO injunctive relief from the teams tying, stated:

> "WCCO, attempting to establish a sports channel in this area, was injured by the tie it faced in the marketplace. The tie is no less pernicious because the clubs tied the sale of two products in the same relevant market. The Court notes, moreover, that the jury found that the two teams did more than initially offer a package deal; the clubs required that one product be purchased in order to get the other. *See* Jury Instruction No. 26." Appendix B, A-28.

Only by subsequent artificial application of improper standing tests has WCCO been denied the injunctive and damages relief to which it is entitled.

REASONS FOR GRANTING THE WRIT

The writ should be granted in this case to overturn precedent that dangerously compromises fundamental tenets underlying United States antitrust law and policy—that private parties are entitled to injunctive relief against continuing violations of the antitrust laws and to damages for injury to them from antitrust violations. The courts below have subverted this Court's *Brunswick* decision into a weapon to be used to overturn these vital tenets and permit antitrust violations found by a jury to be unreasonable restraints of trade to continue for many years without remedy.

This case raises three important issues controlling the remedial provisions of the federal antitrust laws: *First*, does the requirement in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) that a plaintiff have "antitrust injury" for standing to recover damages in an antitrust suit under Section 4 of the Clayton Act apply equally to entitlement to injunctive relief under Section 16 of the Clayton Act? *Second*, is the requirement of standing for injunctive relief under Section 16 of the Clayton Act satisfied as a matter of law in this case where a customer has proven, to a jury, a continuing pooling and tying agreement in violation of Section 1 of the Sherman Act entered into by the suppliers in the market in which the customer seeks to purchase? *Third*, does a potential purchaser who has been injured by reason of the operation of a tying agreement that violates Section 1 of the Sherman Act lack antitrust standing, as a matter of law, to recover *damages* for its injury because it made no actual purchase?

These three important questions of federal law have not been, but should be, directly decided by this Court. In denying standing in this case, the Court of Appeals resolved all three of these questions in a manner in conflict with existing precedent in other circuit courts. The reasoning of the Court of Appeals is also inconsistent with prior decisions of this Court. Supreme Court Rule 17.1(a) and (c). Further, this Court has recognized the need to clarify the rules governing standing to assert claims for injunctive relief for violations of Clayton Act Section 7, by granting a writ of certiorari in *Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S.Ct. 784 (1986) (No. 85-473). The same need also exists for determining standing to assert injunctive claims based, as here, on violations of Section 1 of the Sherman Act.

It is particularly important that this Court's decision in *Brunswick*—concerning standing for *damages* under Section 7 of the Clayton Act where no actual restraint of trade is required for a violation—not be extended to the instant case where plaintiff WCCO seeks *injunctive* relief for actual restraints of trade. Here, a jury has already determined that there are existing pooling and tying violations contravening Section 1 of the Sherman Act scheduled by defendants' conspiracy to continue until the year 2002.

No more appropriate plaintiff than WCCO has come forward or can be identified. The Court of Appeals denies WCCO standing to seek injunctive (or damages) relief from these violations despite WCCO's status as a "leading competitor in the broadcasting business in the Minneapolis-St. Paul area" (Opinion, Appendix A, A-14, note 7). As such a broadcaster, WCCO sought and will seek in the future to purchase the telecast rights that are the subject of the unlawful agreement. WCCO has already been injured by the unlawful agreement and that injury will recur at any time WCCO, a major telecaster of sporting events, seeks in the future to purchase telecast rights of either defendant team.

The future injury to WCCO is imminent. Respondent Spectrum, to whom the Twins and North Stars had granted pay telecast rights pursuant to their unlawful conspiracy, abandoned its pay television service distributing Twins and North Stars programming in the fall of 1985. The teams together through their conspiracy, TwinStar, now have for sale, pursuant to that agreement, the pay telecast rights of each, as well as those other telecast rights that they had not sold to Spectrum or others.

This Court should grant review in order to resolve issues of fundamental significance concerning the availability of rem-

edies to customers of antitrust law violators and to grant recognition to the strong public policy in favor of private enforcement of the antitrust laws. Simply stated, the Court of Appeals has (i) created standing tests contrary to legal precedent and (ii) overlooked material undisputed facts in the record and applicable law establishing standing under any test.

I. *CERTIORARI* SHOULD BE GRANTED TO DETERMINE WHETHER THE *BRUNSWICK* ANTITRUST INJURY REQUIREMENT FOR STANDING TO RECOVER DAMAGES UNDER CLAYTON ACT SECTION 4 APPLIES EQUALLY TO INJUNCTIVE RELIEF UNDER CLAYTON ACT SECTION 16.

1. In its decision, the Court of Appeals incorrectly applied the *same* rule to determine standing to seek injunctive relief under Clayton Act Section 16 as applies pursuant to *Brunswick* to a claim for damages under Section 4 of the Clayton Act. The Court of Appeals stated:

> "Moreover, the District Court correctly noted that as to antitrust injury, the rules under §4 also apply to actions under §16. . . .
>
> WCCO thus must demonstrate threatened *antitrust* injury to receive injunctive relief." Opinion, Appendix A, A-16.

In fact, however, the clear language of the statutes and established precedent of this Court demonstrate that a different, less restrictive standard applies to a claim for injunctive relief. *State of Hawaii v. Standard Oil Company of California*, 405 U.S. 251, 260-61 (1972); *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 130-32 (1969). This is consistent with an antitrust policy objective of not allowing antitrust law violations to continue unimpeded.

Section 4 of the Clayton Act governs claims for damages, and allows any person "who shall *be injured* in his business or property *by reason* of anything forbidden in the antitrust laws" to recover treble damages, costs and attorneys' fees. (Emphasis added) Section 16, on the other hand allows entities to "sue for and have injunctive relief. . . . against *threatened* loss or damage *by* a violation of the antitrust laws." (Emphasis added)

All other courts that have addressed the issue have recognized that proof of "threatened loss or damage" under Section 16 is subject to a less restrictive standard than proof of actual harm under Section 4. This Court so indicated in *Brunswick*, 429 U.S. at 491, and other courts and commentators agree. *E.g., Bogus v. American Speech & Hearing Association*, 582 F.2d 277, 288 (3rd Cir. 1978); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1132 (5th Cir. 1975); II Areeda, P. & Turner, D., *Antitrust Law* (1978) ¶¶ 328, 335e; L. Sullivan, *Antitrust* (1977) §247.

2. In the process of incorrectly applying Section 4 standards to Section 16 claims, the Court of Appeals erroneously relied on this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). In *Brunswick*, one of the nation's largest bowling equipment manufacturers and operators of bowling centers acquired six bowling centers that had defaulted on loans for the purchase of the manufacturer's equipment. Several other bowling centers sued the manufacturer under Section 7 of the Clayton Act for treble damages, claiming that the acquisitions had injured them by reducing the profits they would have earned had the acquired centers been permitted to close. The Court, noting that this was the plaintiffs' only theory of injury, 429 U.S. at 484, ruled that the bowling centers lacked standing to pursue their treble

damages claims, because their damage theory "divorced antitrust recovery from the purposes of the antitrust laws." 429 U.S. at 487.

What made the acquisition allegedly illegal under Clayton Act Section 7 was that a deep pocket manufacturer was potentially eliminating other competitive opportunities in the market by acquiring the six centers. But that was not what caused the sole injury claimed by the plaintiffs. That injury occurred simply because the acquired bowling centers were kept running, thereby preventing plaintiffs from automatically acquiring patrons from the defunct centers.

Of course, from the standpoint of competition at the bowling center level for patrons, the fact that the otherwise defunct centers were kept running was *pro*-competitive. This court, understandably on these facts, proceeded to require that a party seeking *damages* for a violation of Section 7 of the Clayton Act show "injury of the type the antitrust laws were intended to prevent and that which flows from that which makes defendants' acts unlawful." *Id.* at 489.

The strained damages theory of plaintiffs in *Brunswick* is perhaps due to the fact that *Brunswick* involved a claimed violation of Section 7 of the Clayton Act as opposed to Section 1 of the Sherman Act. *See, e.g., Brunswick,* 429 U.S. at 486; Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 10, *Cargill, Inc. v. Monfort of Colorado, Inc.,* 761 F.2d 570 (10th Cir. 1985), *cert. granted,* 106 S.Ct. 784 (1986) (No. 85-473); II Areeda & Turner, *supra,* ¶335d. Section 7 Clayton Act claims inherently involve a greater degree of uncertainty and speculation as to anticompetitive effect than claims involved in a Section 1 Sherman Act case. Section 7 addresses increases in market concentration and changes in market structure, which may or may not affect market behav-

ior. Section 7 makes illegal acquisitions where the effect "*may be* substantially to lessen competition," 15 U.S.C. §18. (Emphasis added.)

In contrast, a violation of Section 1 of the Sherman Act requires that an actual restraint of trade have occurred. If a Section 1 violation is present, or is threatened, no speculation is necessary over the actual anticompetitive effect of the violation. That anticompetitive effect is a given.

Thus, for two reasons the automatic use of the *Brunswick* standard by the courts below to deny WCCO injunctive relief under Section 16 of the Clayton Act was misplaced:

a. *Brunswick* by its terms applies only to standing to recover damages; and

b. *Brunswick* was concerned with a claimed violation under Section 7 of the Clayton Act as to which no actual restraint of trade or anticompetitive effect may ever occur.

In sum, a Section 7 damages case should not be the vehicle for determination of standing for injunctive relief for all threatened antitrust violations and, in particular, not a violation threatening an actual restraint of trade.

3. The most recent decision cited by the Court of Appeals below in support of its proposition that *Brunswick* applies equally to Section 16 standing is *Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570, 573-74 (10th Cir. 1985), *cert. granted*, 106 S.Ct. 784 (1986) (No. 85-473). This Court has already granted a writ of certiorari in that case to review the decision in question. Further, the Fifth Circuit has affirmed a district court decision expressly holding that Brunswick's antitrust injury requirement does not apply to injunctive claims. *Tim W. Koerner & Assoc., Inc. v. Aspen Labs, Inc.*, 492 F. Supp. 294, 300 (S.D. Tex. 1980) *affirmed*, 683 F.2d 416 (5th

Cir. 1982). However, *Monfort* like *Brunswick* is imbued with issues relating to injury and standing under Section 7 of the Clayton Act and does not raise as does the instant case, whether *Brunswick* should be used to deny injunctive relief against an established restraint of trade.

Regardless, the *Monfort* decision does not contain or intimate the proposition for which the Court of Appeals cited it. For example, *Monfort* states:

> "In a section 16 case, *Brunswick* mandates only an inquiry into the causal connection between the threatened injury and the putative antitrust violation . . . The Supreme Court has said that this causation inquiry is like proximate cause analysis. See Blue Shield, 457 U.S. at 477, 102 S. Ct. at 2547; Associated General Contractors, 459 U.S. at 535-36, 103 S. Ct. at 907-08." 761 F.2d at 574.

Similarly, in *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), also relied upon by the Opinion, the court stated:

> ". . . [B]roader standing under section 16 is fully justified because of the difference between the remedies available under each section." 716 F.2d at 662.

In sum, the Court of Appeals constructed a new test for entitlement to injunctive relief from antitrust violations under Section 16. This test is unprecedented and unsupported by any policy considerations. To the extent *Brunswick* has any application to a claim under Section 16, that application is no more extensive than the causation standard set forth above in *Monfort*.

4. Applying a less restrictive standard to claims for injunctive relief is strongly supported by public policy considerations. With damage claims, there is an appropriate concern with windfalls, complex calculations and duplicative recov-

eries. Injunctive relief, however, directly addresses the acts and agreements that make up the violation and is free from these concerns. Injunctive relief simply states that the violation should not continue. For that reason, injunctive actions may proceed even absent proof that the feared or threatened damage has already taken place or that the violation already has occurred. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 130 (1969).

5. The remedial provisions of the antitrust laws reflect the strong public policy in favor of preventing anticompetitive behavior through private enforcement actions. Thus, the purpose of creating private remedies for antitrust violations "was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. at 130-31.

This public purpose underlying private antitrust actions applies with particular force to claims for injunctive relief pursuant to Section 16 of the Clayton Act:

> "Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Hecht Co. v. Bowles, 321 U.S. 321, 329-330, 88 L. Ed. 754, 760, 761, 64 S. Ct. 587 (1944). Its availability should be conditioned by the necessities of the public interest which Congress has sought to protect." Id., at 330, 88 L. Ed. at 761.

Zenith Radio Corp., 395 U.S. at 131.

Judged by this standard, the record in this case clearly warrants the entry of injunctive relief directed at the anticom-

petitive behavior of the respondents. They have entered an illegal tying and pooling agreement that has already had anti-competitive effect and that will continue to do so until 2002 if allowed to remain in effect. Granting WCCO standing to obtain injunctive relief for these established violations not only provides WCCO with "private relief" (an opportunity to participate in a fair bidding process for each of the team's separate rights) but also serves the "high purpose of enforcing the antitrust laws" by protecting competition from an established horizontal agreement in unreasonable restraint of trade. *Zenith Radio Corp.*, 395 U.S. at 131.

II. *CERTIORARI* SHOULD BE GRANTED TO DETERMINE, AS A MATTER OF LAW, THE EXTENT OF THREATENED INJURY A CUSTOMER MUST ESTABLISH TO OBTAIN AN ANTITRUST INJUNCTION BLOCKING A POOLING AND TYING AGREEMENT BY ITS SUPPLIERS WHICH HAS BEEN FOUND TO BE IN UNREASONABLE RESTRAINT OF TRADE.

1. Even assuming the applicability of some form of *Brunswick's* antitrust injury requirement, WCCO amply demonstrated the threatened injury required to establish standing for injunctive relief under Section 16 of the Clayton Act. WCCO is a customer seeking to purchase from the two respondent teams. WCCO's status as a customer directly injured by the teams' actions is confirmed by the jury finding that WCCO had already been injured by the unlawful tying. WCCO fits the classical definition of an appropriate antitrust plaintiff. *See, e.g., State of Hawaii v. Standard Oil Company of California*, 405 U.S. 251 (1972) (granting Hawaii right to sue under Section 16 for injury incurred as a customer); *Hanover Shoe*,

Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) (granting customer standing even under more restrictive Section 4 standard).

Further, unlike cases where standing has been denied, there is no remoteness in WCCO's relationship to the respondents. *E.g., Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 539 (1983) (the plaintiff union lacked standing because it "was neither a consumer nor a competitor in the market in which trade was restrained."). Similarly, in *Brunswick* the plaintiffs had no direct dealings with the defendant. By contrast, WCCO sought and continues to seek an opportunity to purchase directly from either of the respondent teams the telecast rights at issue. This situation is therefore unlike that presented in *Brunswick* and *Associated General Contractors*, and falls squarely within the well-established rule granting customers standing to sue under the antitrust laws.

2. The directness of WCCO's contact with the conspiracy makes it the real party in interest in this case. No other party is as likely to challenge the established violations as WCCO.

The suggestion by the trial court that respondent Spectrum was a likely party to sue for unlawful tying is unrealistic. Spectrum received an eight year exclusive deal on Twins and North Stars rights which, as Spectrum desired, effectively foreclosed competition.

It is only a customer who has been denied, such as WCCO, that is going to complain about a conspiracy that achieves its aim, has injured competition, and will continue to injure competition for its duration. Further, given the jury finding that the teams are the only two competitors in the relevant market, no other competitor is present to bring suit.

3. A customer such as WCCO has standing to seek injunctive relief from the *pooling* conspiracy by its suppliers contin-

uing until the year 2002, notwithstanding the jury finding that although WCCO had been injured by the tying, it had not yet been injured in the first six months of the pooling. WCCO, as a broadcaster and purchaser of telecast rights which has made a substantial investment in facilities for the distribution of paid television, is threatened with price fixing and a group boycott for the 19 and one-half years following the first pooling.

This threat has become particularly acute since Spectrum has withdrawn from business, and it would have occurred in any event when the Spectrum eight year contract ended and the pay telecast rights of the Twins and North Stars again would have been for sale. Further, over-the-air (free) television rights of both teams are being marketed jointly by the teams as a result of their unlawful conspiracy. This pooling, which the jury found to violate Section 1 of the Sherman Act, forces WCCO and any others who seek to purchase these rights to incur the injury represented by price fixing and the other anticompetitive elements of the conspiracy.

4. The opinions below focus exclusively upon the first marketing action of the respondent teams in the fall of 1982. This myopia enabled the courts to make the erroneous assertion that WCCO's sole injury, actual or threatened, was its failure to prevail in its bid in the fall of 1982. It also permitted the courts to overlook the injury which threatens WCCO until the year 2002 from the pooling and tying by its suppliers, found to be unlawful by the jury.

5. Equally incomprehensible is the refusal of the Court of Appeals to provide any injunctive relief from the respondents' unlawful *tying* conspiracy. This result is erroneous for the following reasons: First, the jury expressly found that WCCO had already been injured in its business or property by the

tying of one team's telecast rights to the other team's telecast rights.

Second, the Court of Appeals incorrectly endorsed the trial court's stated concern that providing the injunctive relief requested would require the "dismantling of Spectrum", injunctive relief which was "too expansive". Opinion, Appendix A, A-17. WCCO's requested relief, however, would not have required such dismantling, and the trial court's own initial injunction did not "dismantle" Spectrum.

WCCO simply sought rebidding for the team's rights free from the unlawful tying restraint. The courts clearly have the power to order such relief directed at wrongful acts of "the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. [citations omitted]." *Zenith Radio Corp.*, 395 U.S. at 132.

Indeed, this is the crux of WCCO's position: WCCO wants a fair bidding competition now and in the future, unrestricted by the respondents' artificial constraints. WCCO has not asked the courts to confer any of either team's telecast rights upon it. By finding injury to WCCO, the jury in essence held that WCCO had the ability to purchase the rights if a fair process for their sale existed.

6. The anticompetitive injury threatened to WCCO is attributable to the illegal tying and pooling agreement of the respondents, not the "failure" of WCCO to prevail in its bid. The reason WCCO ultimately was not successful in actually purchasing Twins' telecast rights was because it did not offer a bid for the North Stars rights. WCCO objects to the *bid process itself* which was tainted with antitrust tying and pooling violations.

The Court of Appeals failed to understand this fundamental point. It, in effect, held that any unsuccessful customer desiring to purchase one of two tied products, but not the other, or boycotted by agreement of its competing suppliers would be left without a remedy.

The harm suffered by WCCO, as an aborted customer of the Twins and North Stars is precisely the harm the antitrust laws were designed to protect. That is, WCCO is—and will be—deprived of participating in separate unrestricted bidding competitions for the pay and other telecast rights of each team.

7. The Court of Appeals further errs by accepting the apparent view of the District Court that, even after an antitrust violation has been found, entry of injunctive relief is *discretionary* with the District Court. There is no precedent for this perception. Rather, Section 16 of the Clayton Act mandates entry of injunctive relief. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100 (1969). To hold otherwise would permit the defendants to continue their violations of the federal antitrust laws.

8. The Court of Appeals states that WCCO did not object to the absence of a jury "instruction" on threatened injury under Section 16 of the Clayton Act, and, therefore, could not raise the issue in a post-trial motion or on appeal. The Court of Appeals describes this "procedural point" as "dispositive". Opinion, Appendix A, A-17 - A-18.

It is simply not the law that a *jury* finding of "threatened injury" is a prerequisite for entry of *injunctive* relief under Section 16 of the Clayton Act. In an immediately preceding passage in its Opinion, the Court of Appeals recognized this, observing:

"Section 16 involves traditional principles of equity . . . ." (Opinion, A-16).

Neither the District Court nor the Court of Appeals cited any authority for the novel proposition as to the need for a jury finding of threatened injury, and no decisions under Section 16 support that proposition. *De Hues v. Western Electric, Inc.*, 710 F.2d 1344, 1346 (8th Cir. 1983) and *Mid-America Food Service v. ARA Services*, 578 F.2d 691, 695 (8th Cir. 1978), cited in the Opinion, do not stand for this principle. Rather they simply contain a general admonition in a *non-equity* context that jury instructions not objected to before the court's submission of the case to the jury cannot be challenged in post-trial motions.

It is well-settled that equitable questions are for the Court to decide. *See Beacon Theatres v. Westover*, 359 U.S. 500, 508 (1959); *First State Bank v. Chicago, R.I. & P.R. Co.*, 63 F.2d 585, 590 (8th Cir. 1933). Thus, as a matter of law, the jury made all of the findings required to entitle WCCO to injunctive relief.

III. *CERTIORARI* SHOULD BE GRANTED TO DETERMINE WHETHER ONLY ACTUAL PURCHASERS HAVE STANDING TO RECOVER DAMAGES FOR AN UNLAWFUL TYING AGREEMENT.

1. The Court of Appeals also improperly denied WCCO the right to recover *damages* as a result of the illegal tying agreement. The Court of Appeals sustained this result despite a jury verdict finding, in the liability portion of a bifurcated trial, that WCCO had been actually injured by the illegal tying agreement.

To recover *damages*, WCCO must establish "antitrust injury" as defined in *Brunswick*. The jury in this case was instructed accordingly, and with that instruction in mind, found that WCCO had suffered actual injury.

2. In refusing to make effective the finding of the jury, the trial court, and the Court of Appeals as well, fashioned a new rule of law that only an *actual* buyer may recover damages from an unlawful tying arrangement. Opinion at A-14. *No* supporting authority for this rule is cited by either decision, and indeed, it is contrary to traditional principles of antitrust standing. It has long been recognized that competitors and customers are the traditional antitrust plaintiffs. *See, e.g., Associated General Contractors*, 459 U.S. at 539.

3. Given WCCO's status as a customer seeking to purchase telecast rights offered by the respondent teams, it is simply incorrect to preclude WCCO from a damages trial by ruling, before any evidence has been presented, that WCCO's damages are duplicative or speculative. Respondents as well as the trial court (March 30, 1984 Memorandum and Order at A-40), present no facts in the record suggesting duplicative or speculative recoveries. They only offer generalized apprehensions.

4. The misplaced fear of speculative damages is simply one form of respondents' argument that the success of their conspiracy in keeping WCCO out of the market—making WCCO a non-purchaser—should be rewarded as a damages defense. But there simply is no rule preventing a prospective entrant into a business, who is barred from entry by reason of an antitrust violation, from collecting damages. E.g., *Woods Exploration & Producing Co. v. Alcoa*, 509 F.2d 784, 792 (5th Cir. 1975), *cert. denied*, 423 U.S. 833 (1975). Another recent decision is particularly persuasive—*Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir. 1984) (en banc), *cert. denied*, 106 S.Ct. 788 (1986) (*unsuccessful applicant for cable television rights entitled to recover damages under Section 4 of the Clayton Act*).

5. By denying an actually injured customer the right to seek treble damages, the Court of Appeals has taken an action totally contrary to the statement of this Court in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982):

> "Consistent with the Congressional purpose, we have refused to engraft artificial limitations on the §4 remedy." 457 U.S. at 472.

As the Court stated in *Brunswick*, "treble damages also play an important role in penalizing wrongdoers and determining wrongdoing." *Brunswick*, 429 U.S. at 485.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

LEON RAYMOND GOODRICH
(Counsel of Record)
BRADLEY G. CLARY
MARKO J. MRKONICH
OPPENHEIMER WOLFF
FOSTER SHEPARD AND
DONNELLY
1700 First Bank Building
Saint Paul, Minnesota 55101
(612) 227-7271
Counsel for Petitioner
Midwest Communications, Inc.

April 8, 1986

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 84-5065

Midwest Communications, Inc.,

Appellant,

v.

Minnesota Twins, Inc.; Northstar Hockey Partnership; Twin-Star Enterprises, a general partnership; Minnesota Subscription Television, Inc., d/b/a Spectrum; and Sports Channel, a Minnesota joint venture,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Submitted: February 15, 1985
Filed: December 12, 1985

Before ROSS and BOWMAN, Circuit Judges, and SCHATZ,* District Judge.

* The HONORABLE ALBERT G. SCHATZ, United States District Judge for the District of Nebraska, sitting by designation. Judge Schatz participated in both the oral argument and the subsequent conference of the three judges. The decision reached by the judges in conference was unanimous. Judge Schatz died on April 30, 1985.

BOWMAN, Circuit Judge.

Appellant Midwest Communications, Inc. (WCCO) sued the Minnesota Twins (Twins), the Northstar Hockey Partnership (North Stars), TwinStar Enterprises (Twinstar), Minnesota Subscription Television (Spectrum), and Sports Channel for alleged violations of federal and state antitrust laws, breach of contract, and tortious interference with a contract. The case arises from WCCO's unsuccessful bid for telecast rights to Twins and North Stars games, which the Twins and North Stars had agreed to market jointly. In Counts I, II, and III, WCCO asserted that appellees violated the Sherman Act section 1, 15 U.S.C. § 1, by participating in illegal pooling, product tying, and resale price maintenance agreements. WCCO reiterated these allegations in parallel Counts VI, VII, and VIII, claiming that such actions also violated the Minnesota Antitrust Act of 1971, Minn. Stat. Ann. §§ 325D.49-325D.66 (West 1981). WCCO sought treble damages and injunctive relief under the Clayton Act, sections 4 and 16, 15 U.S.C. §§ 15 & 26, and under the Minnesota Antitrust Act of 1971, Minn. Stat. Ann. §§ 325D.57 & 325D.58 (West 1981). In addition, WCCO unsuccessfully sought a temporary restraining order and a preliminary injunction to preclude joint marketing of telecast rights. *Midwest Communications, Inc. v. Minnesota Twins, Inc.*, No. 3-82-1729 (D. Minn. Jan. 19, 1983) (Memorandum and Order denying motion for preliminary injunction).

The remaining two counts asserted state law claims concerning a contract between the Twins and Midwest Federal Savings and Loan (Midwest Federal), which is not a party to this action. In Count IV, WCCO contended it had acquired Midwest Federal's contractual right of first refusal for certain pay telecast rights to Twins games. WCCO asserted that the Twins

had violated the contract by failing to accept Midwest Federal's offer to buy the pay telecast rights.[1]

Appellees denied WCCO's allegations and counterclaimed for intentional interference with contractual relations, intentional interference with prospective business dealings, deliberate injury, and violations of federal and state antitrust laws.

Before trial, the District Court[2] dismissed the resale price restriction claim arising under federal antitrust law (Count III). *Midwest Communications, Inc. v. Minnesota Twins, Inc.*, No. 3-82-1729 (D. Minn. June 30, 1983) [hereinafter cited as June 30, 1983 Order]. The court concluded that WCCO did not have standing to pursue the claim because WCCO was not within the target area of the economy endangered by the alleged breakdown of competition due to vertical price restraints. *Id.* at 4.

The case was tried before a jury which, by way of a twenty-nine question special verdict, found that appellees had conspired in violation of the Sherman Act. The jury found that the Twins and North Stars had entered into an unlawful tying arrangement and had injured WCCO by requiring it to purchase the telecast rights of both teams in order to obtain the rights to either team. The jury also found that appellees had conspired to pool telecast rights, but that WCCO had not suffered any injury as a result of the pooling arrangement. In addition, the jury determined that Midwest Federal and the Twins had not intended their contract to be assignable insofar as Midwest Federal's right of first refusal for pay television rights was concerned. The jury found that appellees had not

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[1] No issues are raised on appeal regarding Count V, in which WCCO claimed that appellees had violated Minnesota tort law by improperly interfering with the exercise of the right of first refusal and by conspiring to reject Midwest Federal's offer.

[2] The Honorable Robert G. Renner, United States District Judge for the District of Minnesota.

tortiously interfered with the contract between Midwest Federal and the Twins. On appellees' counterclaims, the jury found that WCCO had not intentionally interfered with any of appellees' prospective business dealings or current contractual relations, and also found against appellees on the claims of deliberate injury and violations of federal and state antitrust laws.

The District Court entered judgment on the jury verdict for WCCO on its tying claims (Counts II and VII). The court enjoined the Twins and the North Stars from concerted activity to market, sell, or distribute telecast rights for the games of one team on the condition that the purchaser also acquire the telecast rights for the games of the other team. The court also directed the parties to confer and advise the court within ten days about the scheduling of discovery and trial on WCCO's damages with respect to its tying claims. *Midwest Communications, Inc. v. Minnesota Twins, Inc.*, No. 3-83-1729, at 2 (D. Minn. Sept. 13, 1983) [hereinafter cited as September 13, 1983 Order and Memorandum]. Pursuant to the findings of the jury, the District Court dismissed Counts I, IV, V, VI, and VIII, and appellees' counterclaims.

In response to the parties' post-trial motions, the District Court reconsidered the judgment and withdrew the order granting the injunction. The court granted appellees' post-trial motion for a judgment notwithstanding the verdict on Counts II and VII, and dismissed those counts with prejudice. The basis for this dismissal was the court's decision that WCCO lacked standing to bring its tying claims. *Midwest Communications, Inc. v. Minnesota Twins, Inc.*, No. 3-82-1729 (D. Minn. Mar. 30, 1984) (Memorandum and Order) [hereinafter cited as March 30, 1984 Memorandum and Order]. Correspondingly, the court denied WCCO's attempts to broaden the scope of in-

junctive relief through motions for judgment notwithstanding the verdict on Counts I, IV, V, and VI, and for a new trial on several of the special verdict questions.

On appeal, WCCO contends that the District Court erred in dismissing its antitrust claims on standing grounds. WCCO attacks the jury's finding that it has not suffered injury from the pooling agreement, and argues that it is entitled to injunctive relief. In addition, WCCO asserts that it is entitled to recover its damages resulting from the tying violation, as well as injunctive relief. Although WCCO initially sought both damages and injunctive relief for the alleged vertical price restrictions, on appeal WCCO is seeking only injunctive relief. Further, WCCO attacks the jury's verdict that Midwest Federal could not assign the right of first refusal for pay telecast rights to Twins games. Finally, WCCO claims that the Twins are estopped from contesting the assignment, an issue that the court, without objection, did not submit to the jury.

We affirm the District Court's dismissal of Counts I, II, III, VI, VII, and VIII on the basis that WCCO lacked standing to sue under either federal or state antitrust laws. Because we affirm the District Court's dismissal on standing grounds, we do not consider the merits of the claimed antitrust violations. We also affirm the dismissal of Count IV on the basis of the jury's finding that the contract between Midwest Federal and the Twins was nonassignable. We do not reach the estoppel issue, as it is not properly before us.

I.

We first describe the parties and then sketch the background of the case.

A.

Appellant WCCO is the local CBS network affiliate for the Minneapolis and St. Paul area. Broadcasting by radio since the 1920's and by television since the late 1940's, WCCO carries

network shows and creates its own television programs. One of its subsidiaries, Midwest Cable and Satellite, concentrates on developing the pay television market. The WCCO radio station broadcasts the Twins games, while the television station broadcasts various other athletic events.

Appellees are closely related sporting and broadcasting organizations. The Twins are a professional, major-league baseball team headquartered in Minneapolis. The North Stars are a professional, major-league hockey team that plays its home games in Bloomington, Minnesota. Spectrum is a pay television company serving the Minneapolis and St. Paul area. Subscribers pay a monthly fee for a decoding device that unscrambles the signal that Spectrum broadcasts through the air. After agreeing to Spectrum's offer to telecast their games, the Twins and the North Stars carried out their original plans to create a company—TwinStar—to market and control the broadcast rights of the teams' home and away games. The teams jointly control TwinStar, which holds the exclusive telecast rights for each team's games for twenty years. TwinStar and Spectrum then agreed to form Sports Channel, which televises the Twins and North Stars games in metropolitan Minneapolis and St. Paul. Sports Channel televised its first game, featuring the North Stars, in November 1982.

B.

Midwest Federal began buying the broadcast rights to Twins games in 1971, and sublicensed the television rights to a local television station and the radio rights to WCCO's radio station. In January 1980, the Twins agreed to sell Midwest Federal the exclusive television and radio broadcast rights to certain Twins games for five years. While the television rights were limited primarily to away games, the radio rights encompassed the entire regular season, both home and away games. In addition,

the agreement gave Midwest Federal the right of first refusal with respect to buying the pay television rights to Twins games.[3]

In 1981, the North Stars began exploring the pay television market as a means of increasing their income by expanding the number of games broadcast without jeopardizing their ticket sales at home games. At that time, a local television station televised the North Stars' away games. Following a national pattern in professional sports, the North Stars and the Twins began discussing the possibility of a local, year-around sports channel featuring hockey and baseball. In July 1981, the teams formally agreed to cooperate in developing the then sketchy outlines of a company that would market and control their broadcast rights. The Twins, of course, were still bound by their agreement to offer Midwest Federal the right of first refusal should the Twins receive an offer to broadcast their games on pay television.

The bidding process began in the spring of 1982 with Movie Systems, Inc., a local company that broadcast recent movies

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[3] The agreement provided that:

> In the event that the Club [Minnesota Twins] receives from another person, firm or corporation a bona fide offer which it is willing to accept (a) for the right to broadcast and televise League Games for either three or five years after 1984, or (b) for the right to broadcast League Games in the State of Minnesota, South Dakota, North Dakota, Wisconsin and/or Iowa during 1983 or 1984 by means of cable, closed circuit, pay or community antenna television, then the Club shall immediately give written notice thereof to the Company [Midwest Federal] . . . . The Company shall have ten (10) days after receipt of said written notice to elect to enter into an agreement with the Club for such broadcast and television rights on the same terms and conditions set forth in such notice.

Agreement Between the Minnesota Twins, Inc. and Midwest Federal Savings and Loan Association of Minneapolis, ¶ 23, at 21 (Jan. 11, 1980), *as reprinted in* 1 Joint Appendix to the Parties Briefs, at A-304, A-324, *Midwest Communications, Inc. v. Minnesota Twins, Inc.*, No. 84-5065 (8th Cir. 1984) [hereinafter cited as Joint Appendix].

and similar entertainment. After some negotiation, both teams were dissatisfied with the Movie System offer to broadcast their games. Accordingly, the teams began negotiating with Spectrum in the summer of 1982. The negotiations continued until September 1982 when Spectrum made its offer. During this period, the teams also discussed their telecast rights with WCCO, which intended to sell the rights wholesale to cable television system operators in Minneapolis and St. Paul, as well as regionally. WCCO proposed a "Sports Network" partnership covering both teams in a single bid.

At least three significant differences existed between WCCO's offer and Spectrum's offer. First, WCCO would sell the broadcast rights wholesale to cable system operators who then would offer their customers a channel featuring Twins and North Stars games. Spectrum planned to sell the telecasts directly to its pay television customers with only a small portion of the sales being wholesale to other pay television system operators. Second, the two approaches potentially could reach different size consumer groups. WCCO's approach could reach only consumers connected to a cable system. Spectrum's scrambled television signal, however, could reach anyone with a decoding device and a television set. Finally, WCCO's offer encompassed both the metropolitan rights and the regional broadcasting rights. Spectrum's offer extended only to metropolitan Minneapolis and St. Paul; the teams were free to make other arrangements for regional broadcasts of their games.

Although the teams informed WCCO that they found its offer inferior to Spectrum's, WCCO refused to alter substantially its original proposal. Consequently, on September 22, 1982, the Twins notified Midwest Federal of Spectrum's offer to purchase the Twins' and the North Stars' pay telecast rights. This notice gave Midwest Federal an opportunity to

exercise its contractual right to match Spectrum's bid. Upon request, the Twins provided additional information and granted Midwest Federal a two-week extension (until approximately October 16) in which to decide whether and how to match Spectrum's proposal.

On October 14, 1982, Midwest Federal purportedly assigned its rights of first refusal to WCCO. The next day, Midwest Federal submitted an offer to match that of Spectrum. The proposal recommended a joint venture between the Twins and WCCO; it ignored the North Stars.

The Twins rejected the Midwest Federal/WCCO offer and assigned their telecast rights to TwinStar, which then formally accepted Spectrum's offer. Under the resulting contract, Spectrum acquired the exclusive rights to the Twins' and North Stars' games for eight years. The agreement allows the teams to participate in setting the prices Spectrum charges both cable television system operators under contract with Spectrum and Spectrum's own subscribers.

II.

The question whether WCCO has standing to assert its antitrust claims has permeated this litigation. In their answers to the original complaint, appellees asserted the affirmative defense that WCCO lacked standing to maintain the action. In a pretrial order concerning WCCO's claim of unlawful resale price maintenance, the District Court found that "WCCO does not have standing to pursue the claims it alleges in Count III because it is not within the area of the economy endangered by the alleged breakdown of competitive conditions within the vertical chain." June 30, 1983 Order, at 3. Granting appellees' post-trial motions, the District Court dismissed the tying claim, and dissolved the injunction it previously had granted, on the basis that WCCO lacked standing to assert the claim.

The court concluded that WCCO, as only a potential purchaser, had not suffered a sufficiently direct injury to have standing to sue. March 30, 1984 Memorandum and Order, at 14-15. In rejecting WCCO's post-trial motions with respect to pooling, the District Court relied upon the jury's specific finding that WCCO had not suffered any injury from the pooling agreement. The court observed that absent injury WCCO had no standing to assert its pooling claims. *Id.* at 16.

WCCO argues that the District Court erred in dismissing WCCO's antitrust claims for lack of standing. We disagree.

A.

The question of standing to sue under the Clayton and Sherman Acts is one of law. As the Supreme Court explained in *Associated General Contractors v. California State Council of Carpenters,* 459 U.S. 519 (1983), antitrust standing requirements go beyond injury in fact; the court must also determine whether the plaintiff, even if injured, is a proper party to bring the action. *Id.* at 535 n.31. The federal statutes contain little to guide courts through this narrowing process. Section four of the Clayton Act authorizes private damage suits for violations of federal antitrust laws by persons injured in their "business or property by reason of anything forbidden in the antitrust laws . . . ." 15 U.S.C. § 15.[4] In addition, section sixteen of the Clayton Act also authorizes private suits for injunctive relief "against threatened loss or damage by a viola-

[4] Section four of the Clayton Act provides that:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may . . . recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15.

tion of the antitrust laws . . . ." 15 U.S.C. § 26.[5] Because the remedies under these two sections are distinct, their standing rules are somewhat different, and we therefore discuss each separately.

B.

Read literally, section four of the Clayton Act confers a right to sue for treble damages upon anyone who claims to have suffered an injury that is causally related to a violation of the antitrust laws. The expansive language in this section makes the statute a potential vehicle for asserting claims based on injuries quite remote from the alleged violation, as long as the plaintiff can show some causal link, however tenuous, between the injury and the violation. The voluminous case law on standing to sue under section four reflects an effort by the federal courts to narrow the scope of the broad statutory language so as to prevent unfair and oppressive results.

Although the Supreme Court has developed a multifactor balancing test to determine whether a plaintiff has standing

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[5] Section sixteen of the Clayton Act provides that:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . .

15 U.S.C. § 26.

to sue under the antitrust laws,[6] the threshold inquiry must focus on the plaintiff's alleged injury. This inquiry is potentially dispositive: if there is no showing of injury, or if the injury alleged or proven is not an "antitrust injury," the plaintiff does not have a claim cognizable under the antitrust laws.

As the Supreme Court has noted repeatedly, Congress enacted the antitrust laws to protect competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Elsewhere, the Supreme Court has emphasized the reasonableness of assuming that Congress "did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages . . . ." *Blue Shield v. McCready*, 457 U.S. 465, 477 (1982); *see Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-63 n.14 (1972). In light of these controlling principles, the Supreme Court defined an antitrust injury as one that

> the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by

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[6] The Supreme Court has directed courts to evaluate a series of factors that illuminate the character of the plaintiff's harm, the defendant's alleged wrongdoing, and the relationship between them. *Associated General Contractors*, 459 U.S. at 538-45. In *McDonald v. Johnson & Johnson*, this court identified six factors that structure the analysis:

> (1) The causal connection between the alleged antitrust violation and the harm to the plaintiff; (2) Improper motive; (3) Whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) The directness between the injury and the market restraint; (5) The speculative nature of the damages; (6) The risk of duplicate recoveries or complex damage apportionment.

722 F.2d 1370, 1374 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 219 (1984). We most recently reiterated these factors in *Henke Enterprises v.*

> the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Brunswick, 429 U.S. at 489 (citation omitted). The Supreme Court later drew upon this language in stating that an injury that is an integral part of the conspiracy alleged is the type of injury that Congress designed the antitrust laws to prevent. *McCready*, 457 U.S. at 479. In *McCready*, the Supreme Court found that the plaintiff's injury was "inextricably interwined with the injury the conspirators sought to inflict" and concluded that the injury fell "squarely within the area of congressional concern." *Id.* at 484 (footnote omitted); *see also Associated General Contractors*, 459 U.S. at 538; *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 488 (8th Cir. 1985); *Henke Enterprises v. Hy-Vee Food Stores, Inc.*, 749 F.2d 488, 489 (8th Cir. 1984).

We previously have noted that "a mere causal connection between an antitrust violation and harm to plaintiff cannot be the basis for antitrust compensation unless the injury is directly related to the harm the antitrust laws were designed to protect." *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir.), *cert. denied*, 105 S. Ct. 219 (1984) (citing generally to *Brunswick*, 429 U.S. 477). To have standing to sue under the antitrust laws, the plaintiff must be the target of the anticompetitive activity, "not one who has merely suffered indirect, secondary, or remote injury . . . ." *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 710 (11th Cir.

Hy-Vee Food Stores, Inc., 749 F.2d 488, 490 (8th Cir. 1984). Of course, where the plaintiff has not suffered any antitrust injury, the plaintiff does not have standing to sue under federal antitrust laws. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

1984) (citation omitted); *see also Henke Enterprises*, 749 F.2d at 489; *McDonald*, 722 F.2d at 1373-74.

The District Court held that WCCO had not suffered an *antitrust* injury from the alleged tying of the Twins' and the North Stars' telecast rights. Rather, the court characterized WCCO's injury as the loss to a competitor of a potential business opportunity to buy the Twins' and North Stars' telecast rights.[7] Moreover, the court ruled that WCCO's alleged injuries are too remote to allow recovery under the antitrust laws. March 30, 1984 Memorandum and Order, at 13. The court also wrote extensively about the difficulties of fashioning a remedy in this case. The court noted that awarding WCCO damages would only create a potentially duplicative and highly speculative remedy. *Id.* at 13-14. The court concluded that standing must be limited to actual or potential competitors foreclosed from the applicable market and to buyers hurt by the tying arrangement. We agree that WCCO did not fall into either category.

In response, WCCO asserts that the District Court overemphasized potential duplicativeness and speculativeness of injury in analyzing proximate causation. According to WCCO, the District Court is obliged to remedy antitrust violations, and WCCO presents the best (and perhaps only) opportunity to remedy the perceived violations in the instant case. WCCO also contends that appellees unlawfully sought to limit the number of broadcasters bidding on the telecast rights. We reject WCCO's assertions and concur with the District Court's analysis.

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[7] WCCO is a leading competitor in the broadcasting business in the Minneapolis-St. Paul area. It seems quite clear that WCCO's loss of this particular business opportunity did not result in any injury to competition.

WCCO did fail to gain the sports telecast rights it sought. But, as the District Court concluded, this loss was likely regardless of whether appellees engaged in a tying arrangement. Spectrum simply was willing to pay the teams more for their telecast rights. The causal connection between the alleged antitrust violations and WCCO's asserted injury is tenuous at best. WCCO's loss stemmed from its failure to make the most satisfactory bid—a type of loss that always occurs when a transaction involves multiple bidders.[8] The analogy to *Brunswick* is striking. In that case, the plaintiffs claimed that their profits would have increased if the defendant had not taken control of several bowling centers to prevent them from closing. Yet, as the Supreme Court noted, the same "loss" would have occurred if another entity had acquired or refinanced the centers. As we do here, the Supreme Court concluded that the loss was not attributable to or caused by an antitrust violation. *Brunswick*, 429 U.S. at 487-88.

With respect to WCCO's pooling claim, the District Court properly rejected WCCO's contention that the court should set aside the jury's verdict that the alleged pooling conspiracy did not injure WCCO. The court concluded that absent a convincing showing of any injury at all, much less an antitrust injury, WCCO had no standing to assert the pooling claim. We agree with the District Court's dismissal of this claim in conformance with the jury verdict.

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[8] A recent case also focused on the bidding process in the context of antitrust injury. In *TCI Cablevision, Inc. v. City of Jefferson*, 604 F. Supp. 845 (W.D. Mo. 1984), the District Court rejected the plaintiff's claims that it had incurred damages by being forced to participate in a bidding process for cable television rights. As we conclude in this case, the *TCI Cablevision* court concluded that the plaintiff's costs were "too attentuated from the allegedly illegal activity . . . to qualify as an actionable 'antitrust injury.'" *Id.* at 847 (citation omitted). There, interestingly, the plaintiff had been the successful bidder.

After reviewing the facts of this case in light of the standing prerequisites, we affirm the judgment below that WCCO lacked standing under section four of the Clayton Act to pursue its antitrust claims for treble damages.

C.

Focusing on WCCO's standing to seek injunctive relief on its antitrust claims, WCCO contends that the District Court erred by equating the standing tests under sections four and sixteen of the Clayton Act. We find this argument meritless.

Section sixteen involves traditional principles of equity, authorizing relief when the plaintiff demonstrates threatened injury. The remedy "is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs . . . .'" *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 131 (1969) (citation omitted). As one court recently commented, the majority of policy considerations applicable to section four standing analysis also apply to section sixteen standing analysis. *Kartell v. Blue Shield*, 582 F. Supp. 734, 743 n.12 (D. Mass.), *aff'd in part, rev'd in part, vacated in part*, 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 2040 (1985). Here, the District Court clearly indicated that in denying injunctive relief it was applying equitable principles. Moreover, the District Court correctly noted that as to antitrust injury, the rules under section four also apply to actions under section sixteen. *See Parks v. Watson*, 716 F.2d 646, 662 (9th Cir. 1983); *Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934, 938 (5th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); *Kartell*, 582 F. Supp. at 743. *Cf. Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570, 573-74 (10th Cir. 1985). WCCO thus must demonstrate threatened *antitrust* injury to receive injunctive relief.

The District Court rejected WCCO's request for injunctive relief on the tying claim, finding that WCCO had not shown

any actual or threatened antitrust injury. The court also found that WCCO's requested relief would require the dismantling of Spectrum and Sports Channel. The court refused to "allow a private party suffering no actual or impending antitrust injury to obtain such expansive injunctive relief." March 30, 1984 Memorandum and Order, at 15.

In arguing its entitlement to injunctive relief on the tying claim, WCCO relies heavily on *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130 (8th Cir. 1981), *cert. denied*, 457 US. 1111 (1982). This reliance is misplaced. In *Rosebrough*, burial marker and monument manufacturers sued several cemeteries alleging that the cemeteries, by requiring burial plot owners to have marker foundations prepared by the cemeteries, fostered an illegal tying arrangement. The Court held that a plaintiff may obtain injunctive relief by showing both a violation of the antitrust laws, *and* threatened loss or damage attributable to the violation. *Id.* at 1147. However, an antitrust violation alone is not enough; the plaintiff must also show a threatened antitrust injury. We believe that the District Court correctly concluded that WCCO has not made the requisite showing. Any loss to WCCO, actual or threatened, flows from WCCO's failure to prevail in the competitive bidding for rights to the Twins' and North Stars' games. There is no actual or threatened injury to competition, and thus no antitrust injury.

The same conclusion applies to WCCO's pooling claims, where WCCO also failed to show a threatened antitrust injury. The District Court concluded that the jury's failure to find any injury to WCCO confirms the lack of proximate causation between the alleged pooling conspiracy and any threatened injury. Moreover, the court added that WCCO had not objected to the absence of a jury instruction on threatened injury

and thus could not raise this issue in a post-trial motion. Fed. R. Civ. P. 51; *see DeHues v. Western Electric Co.*, 710 F.2d 1344, 1346 (8th Cir. 1983); *Mid-America Food Service v. ARA Services*, 578 F.2d 691, 695 (8th Cir. 1978). We agree. Although the procedural point is dispositive, we point out that WCCO's asserted threatened injury is nothing more than its asserted actual injury removed to some future date, and since it entails no threatened injury to competition is it not an antitrust injury.

WCCO also appeals the District Court's dismissal of the two counts alleging that the teams imposed vertical restrictions on the prices that broadcasters may charge their customers. The District Court found that WCCO had not purchased either team's broadcast rights, was not a cablecaster that had attempted to purchase products or services from Spectrum or Sports Channel, and was not a target of appellees' alleged vertical restraints. The court noted WCCO's failure to allege it was engaged in an economic activity which a prohibition of vertical restraints is intended to protect. In conclusion, the court held that WCCO did not have standing to challenge the alleged vertical price restrictions. We concur: WCCO has not identified *any* threatened injury to itself, much less an antitrust injury.

D.

Because we conclude that WCCO lacked standing to pursue its federal antitrust claims for either treble damages or injunctive relief, we do not reach the merits of those claims. However, we will comment on our perception of the lack of substance in WCCO's antitrust claims. We have not found in WCCO's allegations any claim of injury to competition in any defined, relevant, product or geographic market. Problems of market definition aside, the level of competition probably in-

creased when Spectrum won its bid for local telecast rights to the Twins' and North Stars' games. Otherwise, if WCCO had prevailed on its initial bid, WCCO would have controlled the Twins' radio broadcast rights, both teams' metropolitan telecast rights, and the regional telecast rights. With Spectrum prevailing, WCCO retained the Twins' radio broadcast rights, Spectrum held the metropolitan telecast rights, and another entity could acquire the unassigned regional telecast rights.[9]

We also note in passing the enormous substantive problems with WCCO's tying claim. Chief among these is WCCO's failure to identify the tying product or the tied product. In light of that failure, we have difficulty seeing how the jury could have rationally assessed appellees' economic power in the tying product or the anticompetitive effect, if any, of the alleged unlawful tying arrangement in the market for the tied product. *See Rosebrough Monument Co.*, 666 F.2d at 1140-41. In short, we seriously doubt that WCCO made a sufficient tying case to warrant submission of this claim to the jury. However, because of our affirmance of the District Court's dismissal of WCCO's antitrust claims on the ground that WCCO lacked standing to assert them, we need not explore the substantive merits of any of those claims.

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[9] The increased numbers of participating broadcasters and games telecast sharply distinguishes this case from *National Collegiate Athletic Ass'n v. Board of Regents*, 104 S. Ct. 2948 (1984). There, the Supreme Court held that the NCAA unreasonably restrained trade by limiting the number of games member institutions could televise. The district court also had found horizontal price fixing. This combination of restraints particularly influenced the Court. *Id.* at 2962.

III.

In its complaint, WCCO asserted three state antitrust claims under the Minnesota Antitrust Act;[10] these claims parallel the federal claims. Our review of the District Court's orders, memoranda, and opinions, as well as the parties' briefs, indicates that the court and the parties treated the state claims as the equivalent of the federal claims, both substantively and for purposes of standing analysis. With the exception of the original dismissal of Count III, when the District Court dismissed each federal count the parallel state count also fell.[11] Moreover, the jury instructions did not distinguish between federal and state antitrust law.

The record presented to this Court does not show that the parties contested this treatment of state law; the parties did not object to the jury instructions and have not raised any issue on appeal regarding possible distinctions between the state and the federal antitrust laws. WCCO has not suggested that the Minnesota courts would analyze the question of stand-

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[10] In 1982, the relevant time period for this suit, the Minnesota Act stated that "[a]ny person, any governmental body, or the state of Minnesota or any of its subdivisions or agencies, injured by a violation of sections 325D.49 to 325D.66, shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees." Minn. Stat. Ann. § 325D.57 (West 1981).

The statute also provided: "In addition to other remedies provided by sections 325D.49 to 325D.66, the courts of this state shall have jurisdiction to grant such temporary, interlocutory, or permanent injunctive relief as is necessary to prevent and restrain violations of sections 325D.49 to 325D.66." Minn. Stat. Ann. § 325D.58 (West 1981).

[11] Inexplicably, when dismissing Count III, the District Court did not also dismiss the parallel state law count, Count VIII. June 30, 1983 Order. The court, apparently correcting its earlier oversight, dismissed Count VIII in its September 13, 1983 order.

ing under the Minnesota antitrust laws in a manner different from the federal courts' approach to standing in private actions under sections four and sixteen of the Clayton Act. Accordingly, we treat the state and federal statutory schemes as equivalent for standing analysis purposes. For the same reasons that we already have held that WCCO lacked standing to pursue its federal antitrust claims, we hold that WCCO lacked standing to pursue its state antitrust claims.

IV.

WCCO contests the jury's verdict that Midwest Federal could not assign its contractual right of first refusal to WCCO. WCCO first contends that a party to a contract may assign all its rights in the contract, including future rights and benefits. According to WCCO, the "plain language" of the agreement unambiguously permitted Midwest Federal to assign its contractual right of first refusal. WCCO alternatively contends that regardless of the validity of the assignment, the Twins are estopped from raising the defense that the assignment was invalid due to their initial acquiescence in the assignment.

The agreement between Midwest Federal and the Twins gave Midwest Federal "the right to assign all or any of the *radio and television broadcasting rights* granted to it" by the agreement.[12] (Emphasis added) On October 14, 1982, Midwest Federal purportedly assigned its right of first refusal of pay television rights to WCCO. *See supra* note 3.

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[12] The agreement provided:

> [Midwest Federal] shall have the right to assign all or any of the radio and television broadcasting rights granted to it by the terms of this Agreement to another company or companies operating a radio and television station in Minneapolis, Minnesota, suitable for televising and broadcasting the games covered by the terms of this Agreement . . . .

Agreement Between the Minnesota Twins, Inc. and Midwest Federal Savings and Loan Association of Minneapolis, ¶ 20, at 20 (Jan. 11, 1980), *as reprinted in* 1 Joint Appendix, *supra*, at A-323.

Under Minnesota law, as the District Court correctly noted, the meaning of an ambiguous contract provision presents a question of fact for the jury. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979); *Westphal v. Anderson*, 347 N.W.2d 85, 87 (Minn. App. 1984). A contract is ambiguous when it is reasonably susceptible to more than one interpretation or construction. *William B. Tanner Co. v. Waseca-Owatonna Broadcasting*, 549 F. Supp. 411, 413 (D. Minn. 1982). When construing a contract, the fact-finder must allow the parties' intent to prevail. *Turner*, 276 N.W.2d at 66; *Westphal*, 347 N.W.2d at 88; *Republic National Life Insurance Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979).

The District Court's determination of whether an ambiguity exists is a question of law that this Court may review *de novo*. *See Composite Technology, Inc. v. Underwriters at Lloyd's, London*, 762 F.2d 708, 710 (8th Cir. 1985); *Span-Deck, Inc. v. Fab-Con, Inc.*, 677 F.2d 1237, 1249 (8th Cir. 1982), *cert. denied*, 459 U.S. 981 (1982) (citing *Republic National Life Insurance*, 279 N.W.2d at 354). In the instant case, we have considered this question and are satisfied that the District Court correctly found that the contract was ambiguous concerning assignment of pay television broadcast rights. In light of the ambiguity, the parties were allowed to submit evidence to resolve the ambiguity, and the court submitted the issue of the parties' intent to the jury, directing it to decide whether the contract permitted Midwest Federal to assign the right of first refusal. In the special verdict, question nine, the jury stated its finding that the January 11, 1980 agreement did not permit the assignment between Midwest Federal and WCCO, thus resolving the evidentiary conflict on the issue of the parties' intent in favor of the Twins.

In reviewing the District Court's denial of WCCO's motion for judgment notwithstanding the verdict, we consider the

evidence in the light most favorable to the Twins, assume that the jury resolved all conflicts of evidence in favor of the Twins, assume as true all facts that the Twins' evidence tended to prove, and give the Twins the benefit of all favorable inferences. We would overrule the District Court only if the evidence is not susceptible of any reasonable inference sustaining the Twins' position. *Brown v. Missouri Pacific Railroad,* 703 F.2d 1050, 1052 (8th Cir. 1983). *See also Brown v. Syntex Laboratories,* 755 F.2d 668, 671 (8th Cir. 1985); *DeFranco v. Valley Forge Insurance Co.,* 754 F.2d 293, 295 (8th Cir. 1985). Although the issue of assignability was hotly disputed at trial, there is evidence to support the jury's verdict. The District Court thus was correct in denying WCCO's motion for judgment notwithstanding the verdict.

We need not consider WCCO's argument that Midwest Federal assigned not only the right of first refusal but also any causes of action under the contract related to that right. WCCO did not raise this issue before the trial court in its post-trial motions; therefore, the issue is not properly before this court. *Singleton v. Wulff,* 428 U.S. 106, 120 (1976); *Spear v. Dayton's,* 771 F.2d 1140, 1144 (8th Cir. 1985).

Finally, WCCO asserts that the Twins are estopped from challenging the assignment because of the Twins' conduct. The conduct alluded to included a conversation between the Twins' lawyer and Midwest Federal's lawyer in which the Twins' lawyer allegedly did not object to the assignment. Furthermore, WCCO argues that the Twins did consider the Midwest Federal/WCCO offer made in competition with Spectrum's proposal without objecting to the parties involved. We do not reach the merits of this claim. As the District Court noted, WCCO did not object to the court's failure to give a jury instruction on the estoppel issue, and so the issue was not sub-

mitted to the jury. The District Court was undoubtedly correct in denying WCCO's post-trial motion seeking to resurrect the estoppel issue, and WCCO is barred from raising this issue on appeal. *See* Fed. R. Civ. P. 51.

V.

For the reasons set forth above, we affirm the judgment of the District Court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-82-1729

Midwest Communications, Inc.,

Plaintiff,

vs.

Minnesota Twins, Inc.; Northstar Hockey Partnership; TwinStar Enterprises, a general partnership; Minnesota Subscription Television, Inc., d/b/a Spectrum; and Sports Channel, a Minnesota joint venture,

Defendants.

ORDER AND MEMORANDUM

Oppenheimer, Wolff, Foster, Shepard and Donnelly, by Leon Goodrich, Thomas P. Kane, and Bradley G. Clary, appeared for plaintiff Midwest Communications, Inc.

Dorsey & Whitney, by Peter S. Hendrixson, Marianne D. Short, and Kevin W. Rouse, appeared for defendants Minnesota Twins, Inc., Minnesota Subscription Television, Inc., d/b/a Spectrum and Sports Channel, a Minnesota joint venture.

Mackall, Crounse & Moore, by Timothy D. Kelly and Franz Jevne III, appeared for defendant Northstar Hockey Partnership and TwinStar Enterprises, a general partnership.

The above-entitled action came on for trial before a jury and the undersigned commencing June 20, 1983 and ending August 19, 1983. On August 22, 1983, the jury returned a special verdict.

Based on the special verdict, the suggestions that counsel asked the court to consider pursuant to Fed.R.Civ.P. 58, and all the files and records herein, the court HEREBY ORDERS that:

1. Counts I and VI be dismissed.
2. Count IV be dismissed.
3. Count V be dismissed.
4. Count VIII be dismissed.
5. The counterclaims of all defendants be dismissed.
6. Judgment be entered in plaintiff's favor on Counts II and VII.
7. The Minnesota Twins, Inc. and the Northstar Hockey Partnership are each enjoined from directly or indirectly entering into, adhering to, maintaining or furthering, or attempting to enter into, adhere to, maintain, or further, any combination, conspiracy, agreement, understanding, or concert of action with each other to market, sell, or distribute the telecast rights for the games of one team on the condition that the telecast rights for the other team be acquired in whole or in part.
8. Within ten (10) days of entry of this judgment, the parties confer and advise the court concerning scheduling of discovery and trial to determine the amount of damages awardable to plaintiff on Counts II and VII.
9. Plaintiff's petition for costs, disbursements and reasonable attorneys' fees be submitted once damages have been determined.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 13, 1983.

ROBERT G. RENNER
United States District Judge

MEMORANDUM

As might be expected in a complex case with a twenty-nine question special verdict form, the parties dispute the legal impact of the jury's answers. The court's nettlesome task is to harmonize the answers to the special verdict questions. *See Gallick v. Baltimore & Ohio Railway Co.*, 372 U.S. 108, 119 (1963).

The parties first contest the effect of the jury's answers to the interrogatories relating to the antitrust issues. Plaintiff asks the court to enter judgment in its favor on all antitrust counts by ignoring the jury's answer to question number five. It, further, suggests that the jury's finding of injury from the illegal tie could be imputed to Counts I and VI. The court declines to adopt this strained reading of the special verdict. The court clearly distinguished plaintiff's antitrust claims by instructing the jury as follows:

> First, WCCO claims that the Twins and North Stars conspired to form TwinStar and that TwinStar constitutes an unreasonable restraint of trade. The teams admit that on or about November 9, 1982, they formed TwinStar, admit that in TwinStar they pooled their telecast rights and admit that TwinStar was formed for the purpose of maximizing their telecast revenues. The teams deny, however, that TwinStar is the result of a conspiracy or that TwinStar unreasonably restrains trade.
>
> Second, WCCO claims that the teams illegally tied the sale of their telecast rights. The teams deny this.

Jury Instruction No. 16. The jury did not find injury to WCCO from the first claim, but found that the illegal tie injured WCCO. Accordingly, the court entered judgment in plaintiff's favor on only two of its antitrust counts. The injunctive relief provided has been tailored to address the wrong requiring remedy.

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Defendants, in turn, attack the jury's findings as to tying and request that the court rule, as matter of law, that Counts II and VII be dismissed. While their legal arguments are best reserved for motions made after entry of judgment, suffice it to say that the jury found that the clubs refused to sell one team's telecast rights unless the other team's rights were also purchased. WCCO, attempting to establish a sports channel in this area, was injured by the tie it faced in the marketplace. The tie is no less pernicious because the clubs tied the sale of two products in the same relevant market. The court notes, moreover, that the jury found that the two teams did more than initially offer a package deal; the clubs required that one product be purchased in order to get the other. *See* Jury Instruction No. 26.

Plaintiff next disputes the jury's finding that the Twins-Midwest Federal agreement did not permit the assignment entered into by Midwest Federal and WCCO. While the jury also found that the Twins did not properly perform its contract with Midwest Federal, the court refuses to upset the finding that plaintiff did not obtain a valid assignment which would have allowed it to recover for the breach.

Finally, the tortious interference claims and counterclaims must also be dismissed. Even though the jury found that the Twins did not properly honor their agreement with Midwest Federal, they clearly rejected plaintiff's claims that the other four defendants tortiously interfered with WCCO's existing or prospective business relations.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Civil No. 3-82-1729

Midwest Communications, Inc.,

Plaintiff,

vs.

Minnesota Twins, Inc.; Northstar Hockey Partnership; TwinStar Enterprises, a general partnership; Minnesota Subscription Television, Inc., d/b/a Spectrum; and Sports Channel, a Minnesota joint venture,

Defendants.

MEMORANDUM AND ORDER

The parties present the court with a wide array of post-trial motions. Leon R. Goodrich and Bradley G. Clary, Esquires, appeared for Midwest Communications, Inc. ("WCCO"). Peter S. Hendrixson, Esq., appeared for defendants Minnesota Twins, Inc., Minnesota Subscription Television, Inc., d/b/a Spectrum, and Sports Channel. Timothy D. Kelly, Esq., appeared for defendants Northstar Hockey Partnership and TwinStar Enterprises.

A. *Defendants' Motions*

Defendants primarily attack the liability finding as to tying under counts II and VII. They ask the court to withdraw no. 6 of its September 6, 1983 order and dismiss counts II and VII of WCCO's complaint with prejudice. In the alternative, defendants seek a partial new trial on the tying claims within those two counts.

In evaluating whether there is sufficient evidence to support the verdict, the court takes the evidence most favorable to WCCO, and gives it the benefit of all inferences reasonably to be drawn in its favor. *See Farner v. Paccar, Inc.*, 562 F.2d 518, 522 (8th Cir. 1977) (j.n.o.v. standard). The court, moreover, will carefully review the record to determine if the verdict is against the clear weight of the evidence or has resulted in a miscarriage of justice. *See Simpson v. Skelly Oil Co.*, 371 F.2d 563, 570 (8th Cir. 1967) (new trial standard).

1. *Two Products In One Market*

Defendants push three arguments founded upon the structure of the local pay sports programming market, any one of which, if accepted, would strangle the finding of an illegal tie. Intertwined, their contentions construct one product standing alone in one market.

Defendants first renew their claim that TwinStar's offer of the Twins and North Star's telecast rights as a year-round package constitutes the sale of a single product. Both teams' broadcasts, defendants claim, are integral to the success of the programming. Business demands, in other words, compelled the creation of a new product.

All agree that two products must be sold in order to create a tying arrangement. *E.g., Times Picayune Publishing Co.*, 345 U.S. 594, 614 (1953); *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1140 (8th Cir. 1981). The jury was so instructed. *See* Jury Instructions, p. 26. Fatal to defendants' claim, therefore, is the jury's finding that the Twins and North Stars' telecasts formed two distinct products.

The jury's findings depended on two determinations: (1) defining the products, and (2) deciding whether the two products are distinct. It had before it conflicting testimony as to the nature of TwinStar's pay sports offering. The evidence pro-

vided ample room to refuse to treat the two products as inevitably intermingled and to conclude that TwinStar packaged two products which could be sold separately. TVQ, for instance, wanted only North Stars telecast rights. Defendants' expert on pay sports, moreover, conceded that a number of existing and planned pay sports channels have seasonal rather than year-round programming. Mr. Guth, plaintiff's expert, added that the "tying" violation caused serious economic dislocation by preventing the sale of the teams' telecast rights on their own merits.

WCCO offered its most convincing evidence in support of its two product theory, however, when it attacked defendants' defense of business justification. As defendants, in their post-trial briefs, concede, the task of product definition spawned a subsidiary inquiry into whether the TwinStar enterprise could survive if each teams' telecasts stood on its own. Although extended an opportunity to adopt this perspective on the local pay sports programming industry, *see* special verdict question no. 8, the jury believed WCCO's evidence to the contrary. It rejected again the notion that business success required joint sales or one synergestic product.

Defendants' last two structural arguments contesting the illegality of the tie hinge upon the jury's answer to special verdict question no. 1 where it found that the two clubs' broadcasts stood alone in the same relevant market. They deny that tying could be found when TwinStar marketed two products in the same relevant market. They also argue that since the teams' telecasts co-exist in one market *and* possess monopoly power in that market, there can be no anticompetitive effect from the tie. The court rejects both arguments.

Although courts traditionally refer to tying and tied products, an illegal tie does not demand that the two goods fall

into separate relevant markets. As long as the products are distinct, they need not also come from markets which do not compete with one another. That is, two separate products which normally compete may comprise an illegally tied package. For instance, in *United States v. Loew's*, 371 U.S. 38 (1962) and *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), the Supreme Court proscribed the blocked book sale of feature films to exhibitors despite the competition amongst the films for the same dollar. Although found within the same market, the films could not be sold together; each had to stand on its own economic footing.

The confusion stems from ambiguity surrounding product versus market definition. The task of defining both products and markets admittedly often devolves into a normative inquiry with product lines blurring with market boundaries. Nevertheless, an illegal tie requires two products, not two markets. The confusion typically manifests itself when two distinct components from different markets are aggregated and sold as a unit by one company. The inquiry into whether separate markets exist involves whether the two components comprise but a single product. In other words, courts speak of distinct markets but their ultimate concern is product differentiation.

For instance, in *Hirsh v. Martindale-Hubbel, Inc.*, 674 F.2d 1343, 1350 (9th Cir. 1982), the Ninth Circuit examined the question of whether separate markets existed for one firm's information and professional card advertising. Since the two cards did not serve different markets, the court concluded that they could not be separate products. The firm was merchandising one good. Here, as described above, two goods were sold. The fact that the jury found that they competed for the same dollar in the same broadcast market does not, as it did in

Martindale-Hubbel, preclude its finding that two separate products existed. As in *Loew's* and *Paramount Pictures,* the tie "is no less pernicious because the clubs tied the sale of two products in the same relevant market." Order of September 13, 1983 at 4.

Defendants next argue that the package sale of the two clubs' broadcasts cannot be illegal since the two products are the only products in the market. Where the market is already monopolized, they insist, a tie can have no anticompetitive effect.

Monopoly power, however, will not save TwinStar's otherwise illegal tie. A joint venture cannot immunize a tie-in from the antitrust laws simply by having all competing sellers participate in the scheme. This is true even where there would be no adverse effect on any existing competitors. WCCO, however, presented the jury with sufficient evidence to warrant the conclusion that TwinStar's tie required the purchaser to accept terms that could not be exacted in a completely competitive market. *See* Answer to Special Verdict Question No. 7. Purchasers could not individually bid for each teams' telecast rights. In short, the tie-in raised barriers to entry into the pay sports market for purchasers and for other potential sports entities wishing to tap into this emerging broadcast market.

In focusing on the lack of injury to individual competitors, defendants overlook the purposes of the tying laws, including protection of purchasers, potential competitors, and overall competition. These manifest themselves particularly as to the single-product issue, the business justification defense, the economic power issue and the concern with foreclosure. Each, in other words, test the competitive effect, and thus the legality, of the practice.

Fortner I and *Fortner II*, hereafter, for instance, use the economic power issue as the battleground to debate whether a per se violation can be merely by proof of an imposed tie-in upon an appreciable number of buyers or whether a violation demands additional proof of market power. *Compare United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610 (1977) *with Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969). In seemingly adopting the latter approach in *Fortner II*, the Supreme Court suggests that protection of freedom of choice for consumers cannot be an independent basis for antitrust liability. With market power, however, the Supreme Court explains that a tie requires purchasers to accept burdensome terms which could not be exacted in a completely competitive market. 429 U.S. at 620. Antitrust laws, then, are intended to protect economic efficiency over the long run rather than simply guarding individual competing entrepreneurs in the immediate future.

Despite the absence of existing competitors in the TwinStar market, therefore, the jury had considerable evidence to allow it to conclude that the TwinStar tying arrangement is anticompetitive. WCCO's evidence shows that the tie could be seen as requiring purchasers to accede to burdensome terms, foreclosing emerging competitors from launching into this pioneer market, and endangering long-run efficiency in this new field.

As with market power in *Fortner I* and *Fortner II*, these effects on overall competition, if proven by a purchaser or potential or actual competitor, call for elimination of the tie. Defendants, of course, offered evidence contradicting WCCO's anticompetitive charges. The jury, however, resolved the dispute in WCCO's favor.

TwinStar's market power cannot be cast as an unexpected savior against these anticompetitive evils. In *Driskell v. Dallas*

Cowboys Club, Inc., 498 F.2d 321 (5th Cir. 1974), the Ninth Circuit did reject a tying claim by a Cowboy season ticket holder who alleged he was compelled to purchase preseason tickets if he wanted to obtain regular season tickets. The tie in the restricted market for stadium seating simply infringed on consumer choice. Here, however, the jury examined a tie in an emerging market where the two products could have been in keen competition with each other and with other potential entrants. The impact could portend a stagnation of the pay sports market, a market whose long-run characteristics could easily be found by a factfinder to differ substantially from Dallas Cowboy season ticket sales.

2. *Coercion*

Defendants next assert that the court erred in failing to give defendant's proposed coercion and unbundling instructions, crucial here, they argue, because their evidence shows that WCCO wanted both teams' telecast rights. But despite defendants' protestations to the contrary, the court finds the instructions to be complete, particularly in light of TwinStar's market power, the jury's rejection of claims of business justification and defense counsel's own arguments to the jury.

After proposed instructions were discussed with the parties, the court altered them in order to emphasize that tying demands more than the offer of a two-product package. The court's instructions did not use the word "coercion", but they did insist that the seller must have required joint purchase. That is, there would be no sale if WCCO did not buy both teams' rights. The instructions read in part:

> A tying arrangement exists when a seller *refuses to sell one product* (the tying product) *except on the condition that* the buyer also purchase from seller some other product (the tied product). It is *permissible for a person to*

> *ask a buyer to purchase two products simultaneously as long as there is no requirement* that one product be purchased in order to get the other. Court's Instructions, p.26 (emphasis supplied).

The special verdict questions again emphasized the concept that initial refusal did not fulfill the court's definition of tying. Question no. 6 asked whether the Twins and North Stars "entered into an unlawful conspiracy to *require* a buyer of one teams' telecast rights to purchase the rights of the other." (emphasis supplied). The next question asked if the tie injured WCCO. In essence, therefore, both questions asked, in part, if the tie was forced upon WCCO and if the package deal caused competitive injury. Defendants requested the jury to answer "no" to both questions. The jury, however, rejected defendants' characterization of WCCO as an uncoerced "sore loser" as to the tying claim.

The issue of whether broadcasters were demanding a tandem package surfaced again over the defense of business justification. The instructions, at pages 31-32, allowed defendants to argue that all buyers sought, without anticompetitive pressure from defendants, year-round programming as the most efficient alternative. Although presented with another platform from which to press the alleged lack of coercion, defense counsel failed to convince the jury.

This court declines to upset the jury's conclusions. Defense counsel emphasized throughout the trial, including closing arguments, that WCCO wanted both teams. The instructions did not undercut those claims. To the contrary, the court included the essential elements of the defense request in its instructions and left it to counsel to elaborate. With so many issues before the jury, the court did not then, nor does it now, consider defendants' requested instructions appropriate.

Finally, the court notes that neither the Supreme Court nor the Eighth Circuit have focused on the necessity of showing actual coercion in a tie-in case, stating only that tie-ins are coercive. *See, e.g., Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 605 (153) (sic); *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n,* 666 F.2d 1130 (8th Cir. 1981). In those circuits which look for proof of coercion, moreover, they relax the requirement if the tie is accompanied by other factors, such as sufficient market power or evidence of an express tie-in. *E.g., Hill v. A-T-O, Inc.,* 535 F.2d 1349 (2d Cir. 1976) (continued policy of tie-in plus market power sufficient); *Bogus v. American Speech & Hearing Ass'n,* 582 F.2d 277 (3d Cir. 1978) (coercion not required unless express tie-in absent).

Here, the court's instructions as to the required proof of "coercion", and the manner in which counsel cast the evidence for the jurors, support a finding that WCCO did not want to bargain for a dual package. Nevertheless, proof of coercion may well have been unnecessary in light of TwinStar's market power over potential entrants and purchasers, the written proof that prospective purchasers bid for a two-product package, and the economic analysis allowing the jury to determine if this tie made economic sense. *See Bogosian v. Gulf Oil Corp.,* 561 F.2d 434 (3d Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978); *Moore v. Jas. H. Matthews & Co.,* 550 F.2d 1207 (9th Cir. 1977). *See also* Austin, *The Individual Coercion Doctrine in Tie-In Analysis,* 65 Calif.L.Rev. 1143 (1977).

3. *Standing*

Defendants also argue that WCCO's tying claim should be dismissed for lack of standing due to failure to incur antitrust injury. To maintain an action for treble damages under section 4 of the Clayton Act, WCCO must be "injured in [its]

business or property by reason of anything forbidden in the antitrust laws." Antitrust standing requires not only injury to WCCO's business but that WCCO's actual injury be attributable to something the antitrust laws were designed to prevent. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).

The determination of whether WCCO is a proper party to bring suit, therefore, hinges upon "an evaluation of the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1373 (8th Cir. 1983). In *Associated General Contractors v. California State Council of Carpenters*, 103 S.Ct. 897 (1983), the Supreme Court delineated six factors to be considered before enforcing a party's antitrust claim: (1) the causal connection between the alleged antitrust violation and the harm to plaintiff; (2) improper motive; (3) whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness between the injury and the market restraint; (5) the speculative nature of the damages; and (6) the risk of duplicate recoveries or complex damage apportionment.

In applying these factors, the court is reminded that it must view the evidence in the light most favorable to the verdict. It will, therefore, be assumed that TwinStar required broadcasters to purchase both teams in order to get one, lessening the long-run competition in the TwinStar marketplace.

In discussing the impact of the tie-in on the pay sports cable market, defendants consistently confine those to be protected to actual purchasers and existing competitors. Traditionally, it is true that tying laws provide a remedy for purchasers who must buy the dual package at inflated prices or competing suppliers denied free access to the market. *See, e.g., Kypta v.*

McDonald's Corp., 671 F.2d 1282, 1285 (11th Cir. 1983); *Heat-transfer Corp. v. Volkswagenwerk*, 553 F.2d 964 (5th Cir. 1977). However, in this case, where we have a novel venture in an emerging market, the scope defendants recommend for tying protections is too narrow. To insure proper regulation of this infant industry, the court must also protect TwinStar's potential competitors from entry barriers constructed by the tie.

WCCO, however, has not suffered this antitrust injury. Giving WCCO the benefit of all inferences reasonably to be drawn in its favor, the harm it incurred is the lost business opportunity to potentially purchase the Twins and/or North Stars' broadcast rights. A potential purchaser, however, can hardly be said to have standing to challenge the TwinStar tie.

Although the evidence allowed the jury to conclude that the tie prevented WCCO from purchasing property it wanted to purchase, more than a violation in the market and harm to WCCO must be shown. "[A] mere causal connection between an antitrust violation and harm to plaintiff cannot be the basis for antitrust compensation unless the injury is directly related to the harm the antitrust laws were designed to protect." *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir. 1983), *citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

The injury here occurred because another bidder in the market, Spectrum, obtained the available property, albeit at a price which arguably differs from that earned through individual sale. WCCO had both the desire and the capability to enter the pay sports market. Absent the tie, in other words, WCCO may have found itself in Spectrum's place. This result, however, is not the type which Congress sought to rectify. TwinStar's claimed market restraint directly injured only potential

competition. Its indirect impact upon WCCO's business at another level of the market structure is too remote to allow it to recover threefold damages or to invoke this court's injunctive power.

It becomes clear that antitrust standing cannot be given to frustrated potential purchasers when one contemplates the difficulties in fashioning a remedy in damages. If WCCO has standing, so also would all potential distributors of sports programming in the Twin Cities, or at least those who spoke to the teams about pay TV. The result would be duplicative recoveries, a traditional tying concern:

> When an antitrust violation occurs, it causes injury, whether directly or indirectly, to a class of persons who are entitled to the protection of the antitrust laws. The standing doctrine is designed to narrow this broad class of injured persons to a subclass of plaintiffs who are deemed proper parties to sue. The scope of antitrust standing should be determined by reference to the special problems created by treble damage actions, such as ruinous or duplicative recoveries.

Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale Law Journal 809, 836-37 (1977).

The denial of standing is all the more prudent here since the damages to be awarded WCCO would, of necessity, be speculative. Even if WCCO were prepared to purchase telecast rights if sold individually, a chance to participate in a process subjected to the "competitive stresses of the open market" would not guarantee a successful bid. If such rights would have been obtained, moreover, WCCO would yet have to prove it could survive in the cable market and project profits. Such an amount could be but conjecture.

To avoid such ruinous recoveries, standing must be limited to actual or potential competitors foreclosed from the market

and to buyers who actually enter the tying arrangement and are damaged by an increased price.

To allow a private party suffering indirect injury to invoke this court's equity power would be equally unwise. WCCO seeks to dismantle TwinStar and Sports Channel and to require them to discontinue joint marketing. With only a prospective purchaser before the court, the grant of such broad relief would only serve to kick both teams off Spectrum and potentially allow WCCO to take Spectrum's place in the broadcast market. The court stands prepared to protect potential competitors but it will not allow a private party suffering no actual or impending antitrust injury to obtain such expansive injunctive relief.

B. *Plaintiff's Motions*

WCCO vigorously challenges the order of September 6, 1983. First, it insists that the formation of TwinStar and commencement of the Spectrum arrangement constituted a pooling conspiracy demanding broad injunctive and monetary relief under counts I and VI. Second, it seeks judgment on count IV based upon a laundry list of alleged errors regarding assignability of the Twins-Midwest Federal Savings & Loan Assn. (Midwest Federal) contract. Finally, it contends that judgment notwithstanding the verdict is appropriate on count V, regarding interference with a contractual relationship by the North Stars, Spectrum, TwinStar and Sports Channel. None withstands scrutiny.

1. *Pooling*

In seeking disbandment of the joint venture which the clubs formed to break into the pay sports broadcast market, WCCO contends that the court should simply ignore the jury's no-injury finding. This cannot be done. *See International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 369 F.Supp. 316 (D.N.C. 1973), *supplemented*, 380

F.Supp. 976, *remanded on other grounds*, 527 F.2d 1162 (4th Cir. 1975); *Kypta v. McDonald's Corp.*, 671 F.2d 1282 (5th Cir. 1982).

The jury specifically found that the formation of TwinStar and the formation of Sports Channel did not injure WCCO. Absent antitrust injury, let alone the business injury the jury apparently found as regards tying, WCCO has no standing to assert a pooling claims.[1] The standing rules developed in treble damage cases also apply to plaintiffs in injunction actions. *See Nassau County Ass'n of Insurance Agents, Inc. v. Aetna Life & Casualty Co.*, 497 F.2d 1151 (2d Cir. 1974).

WCCO suggests that it might be injured in the future by TwinStar or Sports Channel and thus the threat of injury is sufficient to allow an injunction under section 16 of the Clayton Act, 15 U.S.C. §26. Unlike competitors who turn to the courts to block anticompetitive ventures before they locate in the market, WCCO challenges organizations actively broadcasting in this area. If the two clubs' pooling of resources were to cause injury to WCCO, it would have manifested itself by now. The jury, however, found no injury. WCCO, moreover, did not request a second special verdict question on "threatened injury" and is now estopped from claiming error.

The jury's failure to find any loss or damage to WCCO's business or property also confirms the lack of proximate cause between any alleged pooling violation and threatened damage to WCCO. The threatened loss to WCCO must be a proximate result of the antitrust violation. *Jeffrey v. Southwestern Bell,*

[1] The court will not repeat its discussion of standing in the pooling context. The unique nature of the market precluded an early resolution of the standing issue at trial. The jury verdict as to pooling obviates the need to apply the court's earlier position on standing as to counts I and VI.

518 F.2d 1129 (5th Cir. 1975). Again, the jury was not asked to determine proximate cause regarding threatened injury. Its no-injury finding precludes a conclusion supporting the alleged existing injury.

The failure to find a pooling injury does not conflict with the jury's finding of business injury from tying. Throughout the trial, WCCO correctly took the position that pooling and tying were separate. It cannot now claim that the formation of TwinStar and Sports Channel were the "vehicles" which made tying possible," entitling them to judgment on counts I and IV.

Tying is not a necessary consequence of pooling. Each must stand or fall on its own. Pooling could be accomplished without any injury to WCCO but the teams could go a step further and tie, legally or illegally. Tying is but one marketing form that could arise with or without pooling. Here the jury could have easily concluded that WCCO was not adversely affected by the banding together of two teams until the clubs decided to tie the sale of their telecast rights. The former had no impact on WCCO; the latter barred a potential purchaser from choosing amongst all possible market combinations of goods. Neither amounts to antitrust injury to WCCO.

2. *Assignability*

WCCO next asserts that it is entitled to judgment in its favor on count IV as to its claim of breach of contract by the Twins. Primarily, it attacks the jury's finding that the benefits of the Midwest Federal right-of-first-refusal were not assignable. In addition, it contends that assignability is a question of law; that the jury was improperly instructed on assignability and the Twins are estopped from challenging the validity of the assignment.[2] All of these arguments are without

[2] WCCO also quarrels with the phrasing of question no. 9. The difference suggested by WCCO is one of style and not of substance. More importantly, WCCO never submitted the new phrasing to the court before the jury was instructed.

merit. WCCO, in other words, lacks standing to assert Midwest Federal's breach of contract claims.

All parties agree that if the contract is unambiguous, the issue of assignability is a question of law. As the North Stars note, however, the January 11, 1980 agreement left ambiguous the assignability of pay-TV rights, the crucial ingredient in the clubs' efforts to launch into a new frontier. The issue, then, was the intent of Midwest Federal and the Twins. Given this ambiguity, a question of fact existed for the jury. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63 (Minn. 1979). The agreement was reasonably susceptible to more than one interpretation. *William B. Tanner Co., Inc. v. Waseca-Owatonna Broadcasting*, 549 F.Supp. 411 (D.Minn. 1982).

The jury apparently concluded, based on Mr. Robertson's testimony, that the first-refusal opportunity was intended to allow Midwest Federal to continue a relationship that it had spent a great deal to build if it, and it alone, wanted to meet another bidder's price for the Twins' home game pay telecast rights. This opportunity, the jury found, was never intended to be sold to a third party. Assignability was contemplated only after Midwest Federal obtained broadcast rights pursuant to the Twins-Midwest Federal broadcast agreement.

WCCO insists that it obtained the "benefits" of Midwest Federal's exercise of the first-refusal opportunity. But that is precisely what was found not to be assignable. The jury concluded, on ample evidence, that the contract intended that these benefits accrue only to Midwest Federal—a reasonable interpretation of the contract, not to be disturbed.

The jury's conclusion, moreover, is all the more reasonable since WCCO obtained substantial rights for the assignment fee in fields Midwest Federal and the Twins had a longstanding relationship, i.e. the right to renegotiate radio payments for

two years and the option to continue WCCO's radio relationship with the Twins. Even though it did not receive the pay-TV benefits, WCCO obtained value for its money.

Nor will the jury's conclusion be upset because of failure to instruct on the presumption of assignability. Any such presumption evaporates when the contract in question specifically addresses assignability. *Cf. Koenigs v. Thoeme,* 226 Minn. 14, 31 N.W.2d 534 (1948). When there is an express assignment clause in a contract it is the intention of the parties that determines its scope. 3 *Williston on Contracts* §424 at 143 (1960). The jury's narrow reading of the Twins-Midwest Federal assignment clause is supported by the evidence.

Finally, WCCO charges that the Twins consented to the assignment and are estopped from challenging its assignability.[3] Tim Brown's testimony, however, contradicts WCCO's claim that Midwest Federal could assign the pay-TV benefits of the new bargain. It is true that the Twins, aware of its other relationships with Midwest Federal, entertained the first-refusal offer. Yet that should not prohibit them from later challenging the propriety of WCCO's participation in that offer.

3. *Tortious Interference*

The jury's tortious interference findings are correct and should not be disturbed. Rather than evince confusion, they reflect the jury's understanding of complex business relationships presented during a two-month trial. The jury found that while the Twins did not abide by the letter of their contract with Midwest Federal, WCCO improperly obtained the assignment of the pay-TV benefits of that contract. Then, despite

[3] It is also the court's recollection, although vague, that the estoppel issue was discussed in chambers and all agreed it was not in the case. WCCO, in any event, did not insist upon an estoppel instruction.

its finding that the Twins did not honor the strictures of their Midwest Federal contract, the jury concluded that none of the other four defendants interfered with WCCO's business relationships. Substantial evidence underpins those conclusions, allowing the conclusion that none of the other defendants' business ventures with the Twins constituted intentional interference with WCCO's contractual relations.

Accordingly, based upon the files, records, and oral and written submissions of counsel, IT IS HEREBY ORDERED that:

1. Nos. 6, 7, 8 and 9 of this court's September 13, 1983 order be withdrawn;

2. Defendants' motion for judgment notwithstanding the verdict on counts II and VII of plaintiff's complaint be granted and counts II and VII be dismissed with prejudice;

3. Plaintiff's motions for amendment of the injunctive relief granted in counts II and VII, judgment notwithstanding the verdict on counts I, IV, V and VI, or alternatively, new trial on special verdict questions nos. 5, 9 and 12-19, be denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 30, 1984.

ROBERT G. RENNER
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Civil No. 3-82-1729

Midwest Communications, Inc.,

Plaintiff,

vs.

Minnesota Twins, Inc.; Northstar Hockey Partnership; Twin-Star Enterprises, a general partnership; Minnesota Subscription Television, Inc., d/b/a Spectrum; and Sports Channel, a Minnesota joint venture,

Defendants.

SPECIAL VERDICT

A. RELEVANT MARKET

1. Did there exist a relevant market or submarket in the greater Minneapolis-St. Paul Metropolitan area consisting solely of telecast rights for home and away games of the Twins and North Stars?

Yes

"Yes" or "No"

2. Did there exist a relevant market or submarket in the six state region including all or portions of Minnesota, Iowa, North Dakota, South Dakota, Nebraska and Wisconsin consisting solely of telecast rights for home and away games of the Twins and North Stars?

No

"Yes" or "No"

B. ANTITRUST ISSUES

3. Do the Twins and North Stars compete in the same relevant market in the sales of telecast rights?

Yes

"Yes" or "No"

4. Did the Twins and North Stars enter into a conspiracy in unreasonable restraint of trade?

Yes

"Yes" or "No"

[If your answer to Question No. 4 was "Yes", then, but only then, go to Question No. 5. If your answer to Question No. 4 was "No", skip Question No. 5 and go directly to Question No. 6.]

5. Was WCCO injured in its business or property by the unreasonable restraint of trade?

No

"Yes" or "No"

6. Have the Twins and North Stars entered into an unlawful conspiracy to require a buyer of one team's telecast rights to purchase the rights of the other?

Yes

"Yes" or "No"

[If your answer to Question No. 6 was "Yes", then, but only then, go to Question No. 7. If your answer to Question No. 6 was "No", skip Questions 7-8 and go directly to Question No. 9.]

7. Was WCCO injured in its business or property by the tying of one team's telecast rights to the other team's telecast rights?

Yes

"Yes" or "No"

[If your answer to Question No. 7 was "Yes", then, but only then, go to Question No. 8. If your answer to Question No. 7 was "No", skip Question No. 8 and go directly to Question No. 9.]

8. Is the tying of Twins and North Stars telecast rights justified by a compelling business justification?

No

"Yes" or "No"

C. CONTRACT ISSUES

9. Was the October 14, 1982 Assignment Agreement entered into between Midwest Federal and WCCO permitted under the January 11, 1980 agreement between the Twins and Midwest Federal?

No

"Yes" or "No"

10. Did Midwest Federal remain liable to the Twins under the terms of the pay television offer made under the right of first refusal provision?

Yes

"Yes" or "No"

11. Did the Twins breach the first refusal provision in the January 11, 1980 contract?

Yes

"Yes" or "No"

[If your answer to Question No. 11 was "Yes", then, but only then, go to Question No. 12. If your answer to Question No. 11 was "No", skip Questions 12-19 and go directly to Question No. 20.]

D. TORTIOUS INTERFERENCE

12. Did the North Stars intentionally interfere with WCCO's contractual relations which caused damage to WCCO?

No

"Yes" or "No"

[If your answer to Question No. 12 was "Yes", then, but only then, answer Question No. 13. If your answer to Question No. 12 was "No", skip Question No. 13 and go directly to Question No. 14.]

13. Did the North Stars prove that its intentional interference with WCCO's contractual relations was justified?

"Yes" or "No"

14. Did Spectrum intentionally interfere with WCCO's contractual relations which caused damage to WCCO?

No

"Yes" or "No"

[If your answer to Question No. 14 was "Yes", then, but only then, answer Question No. 15. If your answer to Question No. 14 was "No", skip Question No. 15 and go directly to Question No. 16.]

15. Did Spectrum prove that its intentional interference with WCCO's contractual relations was justified?

"Yes" or "No"

16. Did Sports Channel intentionally interfere with WCCO's contractual relations which caused damage to WCCO?

No

"Yes" or "No"

[If your answer to Question No. 16 was "Yes", then, but only then, answer Question No. 17. If your answer to Question No. 16 was "No", skip Question No. 17 and go directly to Question No. 18.]

17. Did Sports Channel prove that its intentional interference with WCCO's contractual relations was justified?

"Yes" or "No"

18. Did TwinStar intentionally interfere with WCCO's contractual relations which caused damage to WCCO?

No

"Yes" or "No"

[If your answer to Question No. 18 was "Yes", then, but only then, answer Question No. 19. If your answer to Question No. 18 was "No", skip Question No. 19 and go directly to Question No. 20.]

19. Did Twin Star prove that its intentional interference with WCCO's contractual relations was justified?

"Yes" or "No"

20. Did WCCO intentionally interfere with the North Stars' prospective business relations which caused damage to the North Stars?

No

"Yes" or "No"

[If your answer to Question No. 20 was "Yes", then, but only then, answer Question No. 21. If your answer to Question No. 20 was "No", skip Question No. 21 and go directly to Question No. 22.]

21. Did WCCO prove that its intentional interference with the North Stars' prospective business relations was justified?

"Yes" or "No"

22. Did WCCO intentionally interfere with Spectrum's prospective business relations which caused damage to Spectrum?

No

"Yes" or "No"

[If your answer to Question No. 22 was "Yes", then, but only then, answer Question No. 23. If your answer to Question No. 22 was "No", skip Question No. 23 and go directly to Question No. 24.]

23. Did WCCO prove that its intentional interference with Spectrum's prospective business relations was justified?

"Yes" or "No"

24. Did WCCO intentionally interfere with the Twins' prospective business relations which caused damage to the Twins?

No

"Yes" or "No"

[If your answer to Question No. 24 was "Yes", then, but only then, answer Question No. 25. If your answer to Question No. 24 was "No", skip Question No. 25 and go directly to Question No. 26.]

25. Did WCCO prove that its intentional interference with the Twins' prospective business relations was justified?

_____

"Yes" or "No"

26. Did WCCO intentionally interfere with Sports Channel's prospective business relations which caused damage to Sports Channel?

No

_____

"Yes" or "No"

[If your answer to Question No. 26 was "Yes", then, but only then, answer Question No. 27. If your answer to Question No. 26 was "No", skip Question No. 27 and go directly to Question No. 28.]

27. Did WCCO prove that its intentional interference with Sports Channel's prospective business relations was justified?

_____

"Yes" or "No"

28. Did WCCO intentionally interfere with TwinStar's prospective business relations which caused damage to TwinStar?

No

_____

"Yes" or "No"

[If your answer to Question No. 28 was "Yes", then, but only then, answer Question No. 29. If your answer to Question No. 28 was "No", skip Question No. 29.]

29. Did WCCO prove that its intentional interference with TwinStar's prospective business relations was justified?

_____

"Yes" or "No"

DATED: August 22, 1983.

KATHRYN WALLACE

_____

FOREPERSON

APPENDIX E

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 84-5065-MN

Midwest Communications, Inc.,

Appellant,

vs.

Minnesota Twins, Inc., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

January 16, 1986

APPENDIX F

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1982)

APPENDIX G

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . . .

15 U.S.C. § 15 (1982)

APPENDIX H

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

15 U.S.C. § 26 (1982)

Supreme Court, U.S.
FILED
MAY 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1649

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MIDWEST COMMUNICATIONS, INC.,
Petitioner,

vs.

MINNESOTA TWINS, INC.; NORTHSTAR HOCKEY PARTNERSHIP; TWINSTAR ENTERPRISES, a General Partnership; MINNESOTA SUBSCRIPTION TELEVISION, INC., D/B/A SPECTRUM; AND SPORTS CHANNEL, a Minnesota Joint Venture
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

*Peter S. Hendrixson
Marianne D. Short
Kevin W. Rouse
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, MN 55402
(612) 340-2600
Counsel for Minnesota Twins, Inc. and Minnesota Subscription Television, Inc. D/B/A Spectrum

Timothy D. Kelly
Mackall, Crounse & Moore
1600 TCF Tower
121 South Eighth Street
Minneapolis, MN 55402
(612) 333-1341
Counsel for Respondent Northstar Hockey Partnership and Twinstar Enterprises

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*Counsel of Record

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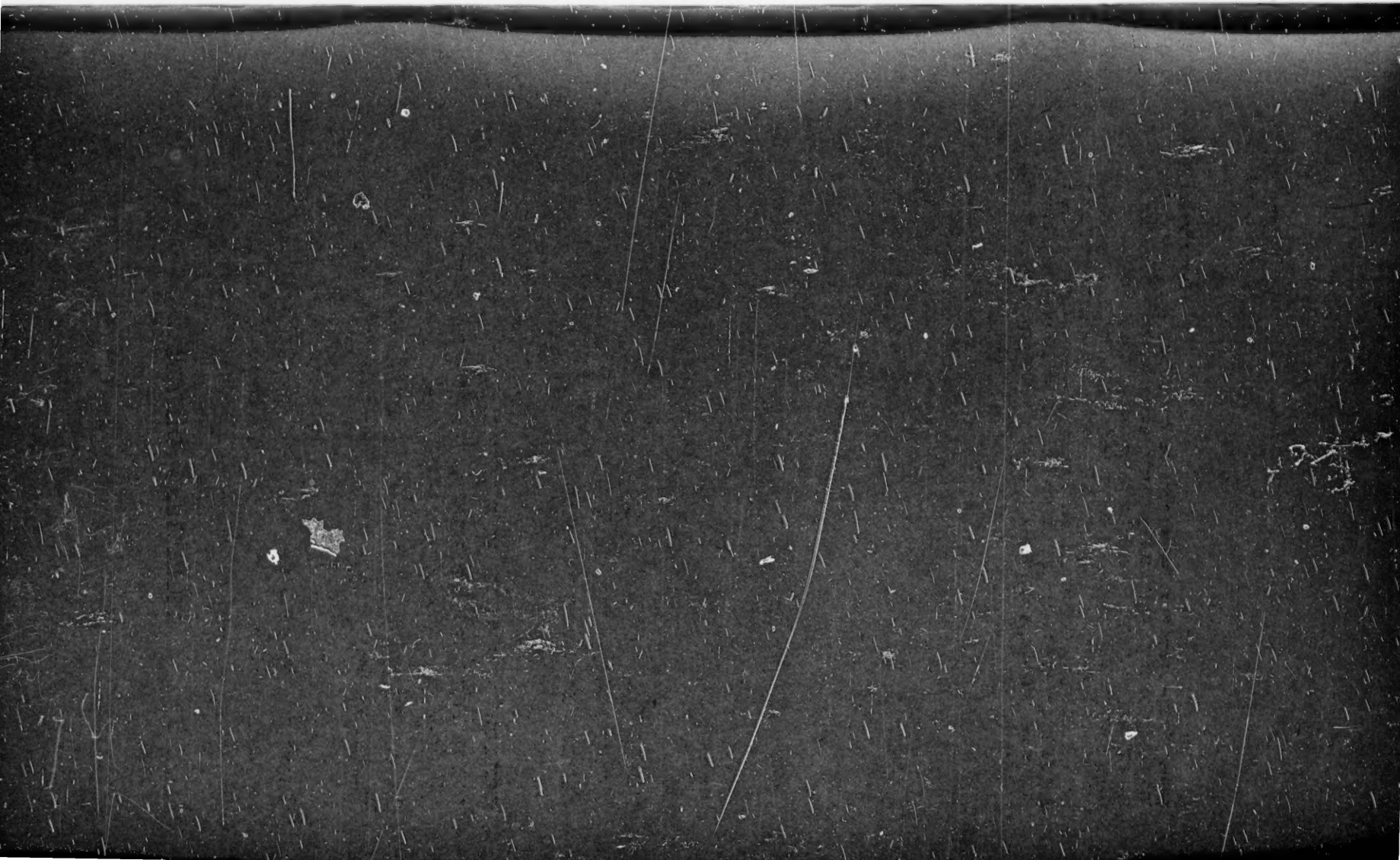

QUESTIONS PRESENTED

1. Whether a plaintiff must demonstrate "antitrust injury" as defined in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), to have antitrust standing for injunctive relief?

2. Assuming a plaintiff must demonstrate "antitrust injury" to have antitrust standing for injunctive relief, whether petitioner has antitrust standing even though the sole cause of its loss was because another buyer outbid petitioner for the products at issue (or because petitioner decided not to bid more)?

3. Whether a potential purchaser has antitrust standing for damages relief based on a tying claim even though it made no purchase because another party actually bought the unique products?[1]

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[1]Pursuant to Supreme Court Rule 28.1, respondent Minnesota Twins, Inc. states that it has no parent company or subsidiaries (excluding wholly owned subsidiaries). Respondent Northstar Hockey Partnership states that it is a partnership consisting of Northstar Financial Corporation, Northstar Met Center Management Corp., GBLSC, Inc., GBLSC West, Inc. Respondent Minnesota Subscription Television, Inc. states that its parent companies are United Cable Television, Inc., Buford Television, Inc., and HEN, Inc; it has no subsidiaries (excluding wholly owned subsidiaries).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1649

MIDWEST COMMUNICATIONS, INC.,
Petitioner,

vs.

MINNESOTA TWINS, INC.; NORTHSTAR HOCKEY PARTNERSHIP; TWINSTAR ENTERPRISES, a General Partnership; MINNESOTA SUBSCRIPTION TELEVISION, INC., D/B/A SPECTRUM; AND SPORTS CHANNEL, a Minnesota Joint Venture
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Minnesota Twins, Inc. ("Twins"), Northstar Hockey Partnership ("North Stars"), Twinstar Enterprises ("Twinstar") and Minnesota Subscription Television, Inc. d/b/a Spectrum ("Spectrum"), respectfully request that this Court deny the petition for writ of certiorari filed by petitioner Midwest Communications, Inc. ("WCCO") seeking review of the decision of the Eighth Circuit Court of

Appeals in this case. In the interest of brevity, respondents are submitting this joint brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

The fact framework in petitioner's statement of the case is incomplete. The facts are fully set forth in the Court of Appeals Opinion. Pet. App. A-2 - A-10. Respondents submit the following specific facts that relate to the issues raised by the petition.

This case is a textbook example of a loser in a bidding contest seeking to obtain through litigation what it failed to achieve in the marketplace. Petitioner WCCO owns the Twin Cities CBS TV affiliate, a CBS affiliate AM radio station that holds the largest market share in the Twin Cities, and a satellite and cable TV company serving Minnesota and the four surrounding states.

WCCO describes itself as "the Upper Midwest's preeminent and most successful broadcaster." District Court Memorandum and Order, January 19, 1983, Resp. App. A-3. It has long featured sports programming as a mainstay of its entertainment, especially on its radio station which has broadcast Twins games for over twenty years, and continues to broadcast them to this day.

Respondent Twins operates the Minnesota Twins major league professional baseball team that plays its home games at the Hubert H. Humphrey Metrodome in Minneapolis, Minnesota in a season from April to October. Northstar Hockey Partnership and its affiliates operate the Minnesota North Stars, a major league professional hockey team that plays its home games at the Met Center in Bloomington, Minnesota (a suburb of Minneapolis) in a season from October to April. Pet. App. A-6.

In 1981 the Twins and North Stars, following a national pattern in professional sports, began discussing the possibility of offering a local year-round sports channel featuring hockey and baseball. Pet. App. A-7. Traditionally, away games had been broadcast on over-the-air ("OTA") or free TV. The hope, however, was to form a joint venture to broadcast home games on pay TV and thereby expand the arena without hurting attendance. The teams stood to gain by increasing their revenues and fans stood to gain by having more opportunities to view sports entertainment.

The teams offered a year-round sports programming opportunity to pay TV suppliers in the Twin Cities and the surrounding five-state region. A bidding process began in the spring of 1982. Pet. App. A-7. One bid the teams received was from Spectrum, a pay TV supplier new to the Twin Cities market, Resp. App. A-3, that proposed to sell both Twins and North Stars' games at retail prices to Twin Cities residents and at wholesale prices to cable TV operators. The proposal left the teams free to sell their regional rights to one or more cable TV operators, including WCCO.

WCCO then submitted a bid for pay TV rights to both teams. Pet. App. A-8. The proposal, which is not mentioned in the petition, envisioned a three-way equity partnership with WCCO, the Twins, and the North Stars. The teams compared the two proposals and informed WCCO that they found its offer inferior to the Spectrum offer. The teams even told WCCO how to increase its offer to match Spectrum's. Resp. App. A-4. Importantly, the Court of Appeals noted that "WCCO refused to alter substantially its original proposal." Pet. App. A-8.

Instead, WCCO surreptitiously purchased a purported

assignment of a right of first refusal for the Twins' pay TV rights that the Twins had given to Midwest Federal, a Minneapolis savings and loan association, as part of its 1980 OTA broadcasting contract. WCCO submitted its second bid, this time for the Twins' rights alone. "The Twins rejected the Midwest Federal/WCCO offer and assigned their telecast rights to Twinstar, which then formally accepted Spectrum's offer." Pet. App. A-9. Twinstar then formed a joint venture with Spectrum, which was named Sports Channel, to broadcast home games of the Twins and North Stars. These events occurred shortly after the 1982-83 hockey season had begun and Sports Channel immediately began pay telecasting of North Stars home games within the Twin Cities.

Within weeks of the start of Sports Channel programming WCCO commenced this antitrust action and immediately moved for a temporary restraining order to stop the competitive broadcasting. After the TRO was denied, WCCO moved for a preliminary injunction to bar telecast of Twins' games in the spring. Resp. App. A-1 - A-12. The District Court described WCCO as "one of this region's leading broadcasters," Resp. App. A-7, and denied the motion stating:

> Since Spectrum has obtained but a toehold in the broadcasting market of this region, this Court finds the possible demise of Spectrum and the enhanced entrenchment of WCCO to be of legitimate concern and therefore, at this time, refuses to turn back WCCO's competition.

Resp. App. A-11. After the trial in June through August, 1983, the District Court entered judgment dismissing all of WCCO's claims except its tying claims and enjoined the

teams from maintaining any combination with each other to market "the telecast rights for the games of one team on the condition that the telecast rights for the other team be acquired in whole or in part." Pet. App. A-6. WCCO immediately moved to expand the injunction, and, as the District Court's later order said, "to kick both teams off Spectrum and potentially [to] allow WCCO to take Spectrum's place in the broadcast market." Pet. App. A-41. The additional requested relief included dissolution of the teams' joint venture with Spectrum. 8th Circuit Appendix (hereafter "8th A") A-267, 279-282. WCCO's requested relief was denied. Pet. App. A-46.

In March, 1984, the District Court granted judgment notwithstanding the verdict on the tying claims. The District Court concluded that WCCO did not have antitrust standing, citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Pet. App. A-37 - A-41. The District Court found that WCCO had both the desire and capability to enter the pay TV sports market but simply allowed itself to be outbid. Pet. App. A-39. A loss in a bidding contest, the District Court ruled, "is not the type [of harm] which Congress sought to rectify through the antitrust laws." *Id.*

The Court of Appeals affirmed the JNOV:

> WCCO did fail to gain the sports telecast rights it sought. But, as the district court concluded, this loss was likely regardless of whether [the teams] engaged in a tying arrangement. Spectrum simply was willing to pay the teams more for their telecast rights. The causal connection between the alleged antitrust violations and WCCO's asserted injury is tenuous at best. WCCO's loss stemmed from its failure to make the most satisfactory bid—a type of loss that always occurs when a transaction involves multiple bidders.

Pet. App. A-15. The Court of Appeals concluded that any threatened loss to WCCO flowed from its failure to prevail in the competitive bidding for the rights to the teams' games: "There is no actual or threatened injury to competition, and thus no antitrust injury." Pet. App. A-17.[2]

The petition states a fact not contained in the record that Spectrum ceased broadcasting pay TV sports in the fall of 1985. Pet. 11, 20. The petition uses this fact to argue that the teams are once again conspiring to sell their pay and other telecast rights in violation of the antitrust laws. Pet. 20.

It is true that Spectrum ceased operating in October, 1985, and stopped providing pay TV entertainment in the Twin Cities, including sports. WCCO, thus, has one less pay competitor. It is equally true, however, that since

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[2]The Court of Appeals did not reach the merits of WCCO's pooling and tying claims but nevertheless found the claims to be so curious from the standpoint of economic common sense and legitimate trade regulation interests that it devoted a section of its opinion to the merits. The Court of Appeals stated:

> However, we will comment on our perception of the lack of substance in WCCO's antitrust claims. We have not found in WCCO's allegations any claim of injury to competition in any defined, relevant, product or geographic market. Problems of market definition aside, the level of competition probably increased when Spectrum won its bid for local telecast rights to the Twins' and North Stars' games. Otherwise, if WCCO had prevailed on its initial bid, WCCO would have controlled the Twins' radio broadcast rights, both teams' metropolitan telecast rights, and the regional telecast rights. With Spectrum prevailing, WCCO retained the Twins' radio broadcast rights, Spectrum held the metropolitan telecast rights, and another entity could acquire the unassigned regional telecast rights.
>
> We also note in passing the enormous substantive problems with WCCO's tying claim. Chief among these is WCCO's failure to identify the tying product or the tied product. In light of that failure, we have difficulty seeing how the jury could have rationally assessed [the teams'] economic power in the tying product or the anticompetitive effect, if any, of the alleged unlawful tying arrangement in the market for the tied product. [citation omitted.] In short, we seriously doubt that WCCO made a sufficient tying case to warrant submission of this claim to the jury.

Pet. App. A-18 - 19.

October, 1985, WCCO has not made a proposal to purchase either team's pay TV rights. It is also true that commencing in 1984 the North Stars entered into a three-year contract with KITN, Inc., to broadcast certain away games on Twin Cities Channel 29, a non-network station. It is also true that commencing in 1985, the Twins entered into a four-year agreement with United Television, Inc., to broadcast games, mostly away games, on Twin Cities Channel 9, another non-network station. The so-called "conspiracy" is supporting active competition in the Twin Cities TV market.

Finally, WCCO failed in its petition to present the Court with an important fact concerning the appropriateness of discretionary review: this case has been settled for the most part with regard to the Twins. In 1984 the Twins were purchased by a new owner who solicited, and obtained, the agreement of WCCO not to pursue any action for damages against the Twins; only the issue of injunctive relief was held open. In 1985 the Twins, apparently forgetting that they were supposed to be conspiring against WCCO, signed a radio broadcast contract with WCCO which essentially confirmed the 1984 settlement. Even if an important federal question were present, which it is not, this case for the most part is moot and therefore not worthy of this Court's discretionary review.

REASONS FOR DENYING THE WRIT

To entice this Court to grant certiorari WCCO invokes the customary "conflict in the circuits" language. Pet. 10. Nowhere is the alleged conflict specified by stating which appellate court decisions conflict with each other. In fact, the appellate courts have consistently rejected WCCO's novel legal theories that *Brunswick* does not apply to

Section 16 claims, or, that proof of an antitrust violation automatically creates antitrust standing. This Court, for clear and correct policy reasons, has always limited antitrust tying plaintiffs to foreclosed competitors in the tied product market or actual purchasers of the tied product. WCCO's invitation to expand the class of damage claimants based on alleged antitrust tying violations to potential purchasers of the tied product should be rejected by this Court because of the inherent problems with duplicate recoveries and speculative damage theories.

In addition to the lack of a conflict in the circuits or a substantial federal question in this case, certiorari in general is not appropriate for several reasons. First, the lower court fact findings, express and implied, contradict the assumptions of the certiorari questions proposed by WCCO Second, severe defects in the antitrust claims of WCCO, Pet. App. A-19, independent of the lack of antitrust standing determination by the District Court and Court of Appeals, make this case atypical such that its general applicability to antitrust standing principles will be virtually worthless.

I.

THIS CASE DOES NOT PRESENT FACTS APPROPRIATE TO DETERMINE WHETHER *BRUNSWICK* ANTITRUST STANDING PRINCIPLES APPLY EQUALLY TO INJUNCTIVE RELIEF UNDER SECTION 16 OF THE CLAYTON ACT AS TO DAMAGES UNDER SECTION 4 OF THAT ACT.

1. WCCO cites the truism that injunctive relief against threatened injury may be available to an antitrust plaintiff not yet injured and not able to obtain damages. Pet. 12-13.

The question of threatened injury on either the pooling or tying claim is only germane, however, once it is determined that WCCO is a proper antitrust plaintiff. WCCO ignores the Court of Appeals conclusion that the injury WCCO claims, whether threatened or already suffered, "entails no threatened injury to competition," Pet. App. A-18, and thus does not confer antitrust standing. The lack of threatened antitrust injury, which is easier to prove than actual antitrust injury, precluded injunctive relief for WCCO.

2. While it is true that Section 16 standing can exist without Section 4 standing, this case does not present a fact scenario enabling the Court to distinguish between Section 4 and Section 16 standing. Although WCCO requested special verdict questions on actual injury in support of its Section 4 claims, it failed to request any special verdict questions on threatened injury to support its Section 16 claims. The District Court held, and the Court of Appeals affirmed, that WCCO's failure to request such a jury instruction was dispositive. Pet. App. A-18. The case WCCO would like this Court to decide, threatened injury despite the absence of actual antitrust injury, simply is not present in this case. Therefore, certiorari should be denied.

3. Acknowledging its trial blunder of failing to request a jury instruction on threatened injury, WCCO then argues that the District Court had the power to issue an injunction because Section 16 involves traditional principles of equity. Pet. 22-23. The argument simply makes matters worse for WCCO because the District Court *did* analyze the issue of threatened injury to WCCO, and concluded there was none. Pet. App. A-42 ("If the two clubs' pooling of re-

sources were to cause injury to WCCO, it would have manifested itself by now.").

Further, in the absence of a jury fact finding or District Court fact finding it is presumed on appeal that the District Court made whatever finding necessary to support the judgment entered. Fed. R. Civ. P. 49(a); *see also* 9 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2507 at 505 (1971). Since the District Court entered judgment denying WCCO relief, there is an implied finding of fact that there was no threatened injury to WCCO.

4. Through a variety of theories, waiver of threatened injury question by WCCO, finding by District Court of no threatened injury, or implied finding of no threatened injury based on judgment entered, it is clear that the record of this case contains no determination of threatened injury of any kind. Absent any such record of any threatened injury, WCCO merely presents the Court with the abstract proposition that because Section 16 standing is easier to achieve than Section 4 standing relief must be granted. To address the first certiorari question raised by WCCO in its petition, whether *Brunswick* applies to Section 16 cases as well as Section 4 cases, the Court needs a case with a lower court record showing no actual antitrust injury, but a fact finding, by a jury or the trial court, of threatened injury. That is not the present case and therefore certiorari should be denied.

5. The basic argument asserted in WCCO's petition is that the Court of Appeals misinterpreted *Brunswick*. In comparing this case to *Brunswick,* the Court of Appeals said:

> The analogy to *Brunswick* is striking. In that case, the plaintiffs claimed that their profits would have increased if the defendant had not taken control of

> several bowling centers to prevent them from closing. Yet, as the Supreme Court noted, the same 'loss' would have occurred if another entity had acquired or refinanced the centers. As we do here, the Supreme Court concluded that the loss was not attributable to or caused by an antitrust violation. *Brunswick*, 429 U.S. at 487-88.

Pet. App. A-15. In response, WCCO tries to avoid the economic wisdom of the *Brunswick* rule by arguing: (a) *Brunswick* is a damages case; and (b) *Brunswick* dealt with Section 7 where an anti-competitive effect is merely probable, not proven. Neither purported distinction has merit.

The petitioner in *Brunswick* did not contest the respondents' standing to seek an injunction, 429 U.S. at 491, so this Court had no occasion to address the question of injunctive relief standing. Without exception, the lower courts, in one degree or another, have affirmed the common sense proposition that *Brunswick* analysis applies to injunctive relief cases. *E.g. Local Beauty Supply, Inc. v. Lamaur, Inc.*, 1986-1 Trade Cases (CCH) ¶ 67,040 (7th Cir. April 9, 1986) ("A plaintiff seeking equitable relief under § 16 of the Clayton Act should be no less representative of the interests of the antitrust 'victims' than those seeking damages under § 4."); *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986); *Central National Bank v. Rainbolt*, 720 F.2d 1183, 1186 (10th Cir. 1983); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210-211 (3rd Cir. 1980).[8]

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[8]WCCO erroneously alleges that the Fifth Circuit affirmed a District Court decision "holding that *Brunswick's* antitrust injury requirement does not apply to injunctive claims." Pet. 15. In *Tim W. Koerner & Assoc. v. Aspen Labs, Inc.*, 492 F.Supp. 294, 300 (S.D. Tex. 1980), *aff'd*, 683 F.2d 416 (5th Cir. 1982), the district court held that "the pivotal issue for standing under Section 16 is proximate cause . . . resulting from the antitrust violation." The district court said the "analysis of proximate cause under Section 4, as set forth above [citing *Brunswick*] is also applicable to Section 16." *Id.* at 301. The Fifth Circuit affirmed without opinion. Thus there is no "conflict in the circuits."

It makes no sense to suggest that a plaintiff may achieve injunctive relief under Section 16 when his threatened injury does not flow from that which makes the questioned acts unlawful under the antitrust laws. To adopt WCCO's view would divorce the remedy from the purpose of the underlying substantive statute.

The second distinction of *Brunswick* asserted by WCCO would rob *Brunswick* of its meaning. The point of antitrust standing is that not everyone is a proper person to challenge certain conduct. To suggest that proof of violation confers antitrust standing for any type of relief means that cases like *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), and *Brunswick*, where a violation was assumed, are meaningless. The argument, however, does point up the unsuitability of this case for plenary review; this Court should encourage early antitrust standing decisions, not after a two-month trial.[4]

6. WCCO erroneously suggests that certiorari should be granted here for the same reasons it was granted in *Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S.Ct. 784 (1986) (No. 85-473). WCCO admits, however, that the *Monfort* case and this case involve different issues relating to antitrust injunctive relief. Pet. 16.

Monfort is an antitrust injunction claim by a competitor against a merger by two horizontal competitors in the same market. It is demonstrably dissimilar to the present case.

WCCO's tying claim here would not pass muster under

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[4]Since this case comes to the Court after a two-month trial it is atypical of most standing cases. Therefore, the case is not worthy of certiorari because of its lack of general application to other antitrust standing cases.

the injunctive relief standards stated in *Monfort*, whether they are right or wrong. The Court of Appeals in *Monfort* stated that:

> In [an antitrust injunction case] *Brunswick* mandates only an inquiry into the causal connection between the threatened injury and the putative antitrust violation. If a plaintiff surmounts this causal hurdle, it has standing to seek an injunction. . . The Supreme Court has said that this causation inquiry is like proximate cause analysis, *see Blue Shield*, 457 U.S. at 477, 102 S.Ct. at 2547; *Associated General Contractors*, 459 U.S. at 535-36, 103 S.Ct. at 907-08. To decide whether Monfort has antitrust standing, we now consider whether Excel's increased market power after acquisition of Spencer Beef would be a proximate cause of Monfort's threatened injury.

761 F.2d at 574. Thus, *Monfort* compels a proximate cause analysis. WCCO cannot demonstrate proximate causation between any antitrust violation and any loss to itself because the cause of that loss is Spectrum's decision to outbid WCCO (or WCCO's decision not to increase its own bid when it had the wherewithal to do so). The District Court so found, as did the Court of Appeals. Thus the *Monfort* court, despite granting plaintiff in its case a permanent injunction, would have decided this case precisely as the Court of Appeals did.

Monfort also involves horizontal competitors and squarely presents the question of whether a competitor may assert a Section 7 claim to bar a merger of two other competitors in the same market. WCCO is not a competitor of the Twins or North Stars; it is not a major league professional sports team located in the Twin Cities.

The *Monfort* petitioner (and the Government as *amicus)* argue that competitiors should not have antitrust standing to interfere with mergers because they are motivated to sue for anticompetitive reasons. Allowing standing in such circumstances, the argument continues, would turn the antitrust laws upside down and encourage those fearful of increased efficiency to protect an inefficient status quo though a court action.

That is precisely what happened in this case. WCCO, the self-described "pre-eminent and most successful broadcaster" in the Twin Cities, brought this action to drive a new competitor out of the sports broadcasting market.[5] This result was part of a marketing strategy that WCCO proudly admitted at trial: WCCO witnesses testified it wants *all* the local sports programming for its pay TV, OTA and radio services. 8th A. 887-888. The goal, the WCCO president testified at trial, was to take the rights to both teams, plus the rights to the University of Minnesota team sports, so there would not be any other sports product available for WCCO's competitiors. 8th A. 1152, 1158-59, 1161-62. This case is a classic example of a well-heeled, entrenched economic actor using a costly antitrust action to stop competition.

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[5]As indicated in WCCO's petition, the strategy has succeeded because Spectrum no longer broadcasts on pay TV home games of the Twins or North Stars. The real loser because of this litigation is, of course, the consumer because of the fewer choices available for sports programming. Having driven a competitor from the market with this litigation, WCCO has not renewed any of its old bids for Twins' and North Stars' pay TV rights, or, for Twins' pay TV rights alone.

II.

THE QUESTION OF WHETHER STANDING FOR INJUNCTIVE RELIEF UNDER SECTION 16 EXISTS IS NOT PRESENTED BY THE FACTS OF THIS CASE

1. WCCO next argues that "[E]ven assuming the applicability of some form of *Brunswick's* antitrust injury requirement, WCCO amply demonstrated the threatened injury required to establish standing for injunctive relief under Section 16 of the Clayton Act." Pet. at 18. The proposed certiorari question seeks to have this Court rule as a matter of law that a plaintiff proving an antitrust violation automatically has standing for an antitrust injunction under Section 16. Unfortunately, WCCO again disregards the lower court record in an attempt to generate a question suitable for this Court's review. To understand the shortcomings of WCCO's argument, it must be recognized that the pooling and tying claims of WCCO are distinct counts of the Complaint.

With regard to pooling, Count I of the Complaint, the jury expressly found that there was no actual injury to WCCO. Pet. App. A-48 (Special Verdict Question No. 5: "Was WCCO injured in its business or property by the unreasonable restraint of trade? Answer: No."). Injury to business or property is an essential element of an antitrust claim. 15 U.S.C. § 15 (1982); *see Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877 (8th Cir. 1978). Thus, WCCO's bald assertion that there is standing as a matter of law because an antitrust violation has occurred is simply not true on the facts of the pooling claim—*i.e.* Count I of the Complaint. Indeed, as a matter of law, there is *no* antitrust violation.

2. WCCO attacks the absence of any threatened injury finding by suggesting that the District Court and Court of Appeals looked only at the initial 1982 bidding whereas the pooling exists for twenty years.* Unfortunately, the failure of WCCO to make any proposal to purchase the pay TV rights of either the Twins or the North Stars since the demise of pay TV sports on Spectrum belies any threatened injury to WCCO. Further, WCCO's long-term analysis is negated by the various broadcast rights to Twins' and North Stars' games having been purchased by other entities such as OTA Channel 9 and 29 in the Twin Cities. The so-called pooling of resources is in reality moving the broadcast rights to various entities. Only the long-entrenched WCCO radio broadcast rights to Twins' games has remained stable with the signing of a new contract in 1985 between the Twins and WCCO.

3. The problem with WCCO's cursory remarks regarding threatened injury and the twenty-year term of Twin Star is that they fail to deal with why there is no threatened injury. The District Court observed:

> Unlike competitors who turn to the courts to block anticompetitive ventures before they locate in the market, WCCO challenges organizations actively broadcasting in this area.

Pet. App. A-42. Unlike *Monfort* where plaintiff sought to prevent a merger before it happened and the parties agreed to a combined trial on the merits/preliminary injunction hearing, the present case involves an economic reality.

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*The District Court held, and the Court of Appeals affirmed, that there was no threatened injury to WCCO from the teams' joint venture. Pet. App. A-42. The Court of Appeals also held that the failure of WCCO to request a special verdict question on threatened injury was dispositive. Pet. App. A-18.

Thus, while *Monfort* involves a case where an economic event, *i.e.* a merger, was *about to happen*, the present case involves an economic event, *i.e.* an operating joint venture, that *had happened*.

The jury found no actual injury had occurred to WCCO despite the operation of Twin Star. Pooling was a reality with the formation of Twin Star, the creation of Sports Channel, and the disposition of the pay TV broadcast rights of the two teams. If there was no injury at the point of the trial in 1983, it was quite likely, and the District Court correctly found, that WCCO could show no threatened injury in the future. Therefore, the finding of no threatened injury by the District Court, affirmed by the Court of Appeals, was appropriate based on the factual background. Essentially WCCO is asking this Court to review the case so that the consistent factual determinations of the two lower courts regarding threatened injury may be reversed. Certiorari is inappropriate in such circumstances.

4. The flimsiest analysis by WCCO in its petition is its assertion that if a violation is proved, standing exists. That is simply not true. Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale Law Journal 809, 836-37 (1977) (standing doctrine is designed to narrow the broad class of injured persons to a subclass of plaintiffs who are deemed proper parties to sue). Standing by definition narrows the class of plaintiffs and excludes certain people from bringing antitrust claims, even though they may have been injured by an antitrust violation. Otherwise, the concept of standing would be without meaning because all violations would automatically confer standing on any plaintiff proving them.

5. With regard to the alleged tying violation, Count II of the Complaint, WCCO is simply not the correct party to bring the action. Proper tying plaintiffs are foreclosed competitors in the tied product market or purchasers of the tied product. *United States v. Loew's Inc.*, 371 U.S. 38, 44-45 (1962). The injury to the foreclosed competitors is that they are not permitted to compete in the tied product market. The injury to the purchasers of the tied product is that because of the market power in the tying product, a surcharge or premium is paid by the purchasers of the tied product in the tied product market. WCCO is not a member of either class of persons entitled to bring an antitrust tying claim.

6. WCCO describes itself as a customer (not a purchaser) and cites *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972), for the proposition that as a customer it has standing to sue for injunctive relief. Unlike the State of Hawaii, WCCO was not a customer. WCCO failed to purchase and thus was only a potential purchaser of the pay TV broadcast rights. This Court has never permitted a non-purchaser to assert a tying claim. Simply put, non-purchasers are not affected by the use of tying product market power in the tied product market.[7]

7. WCCO suggests that only it has a motive to sue for tying. The history of tying claims is replete with examples of foreclosed competitors in the tied product market and purchasers of the tied product suing for relief. If another

[7]It is almost nonsensical to deal legitimately with the tying claim of WCCO since the Court of Appeals found that, even if WCCO did have standing, its failure to identify the tied product and a tying product precluded any analysis of economic effect in those markets. Therefore, the Court of Appeals doubted whether WCCO presented a prima facie case for presentation to the jury. Pet. App. A-19.

professional sports team was prevented from selling its pay TV broadcast rights because of the alleged tying arrangement between the Twins and North Stars, it would have standing to sue as a foreclosed competitor. A purchaser of an allegedly tied product, in this case Spectrum, could sue because it paid too much for the package of products, *i.e.* Twins' and North Stars' pay TV rights.

WCCO argues that Spectrum would never sue as the victim of a tie because it wanted both the Twins' and North Stars' pay TV rights. That was a major point at trial; *both* Spectrum and WCCO wanted both teams. If a party wants to buy both the tying and tied products, there has been no tie. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 25 (1984).[8]

8. WCCO argues that unsuccessful customers should be antitrust plaintiffs because: "[T]he Court of Appeals failed to understand this fundamental point. It in effect held that any unsuccessful customer desiring to purchase one of two tied products, but not the other, . . . would be left without a remedy." Pet. at 22. This passage demonstrates fatal flaws in the tying claim of WCCO.

First, it refers to both the Twins' and North Stars' pay TV rights as tied products. To have a tying claim there must be a tying product with market power and an economic effect in the tied product market. *Jefferson Parish*, 466 U.S. at 25. WCCO never identified a tying product or a tied product. Pet. App. A-19.

Second, WCCO misleads this Court by asserting that it

[8]In *Jefferson Parish*, the most recent tying decision of this Court, even though plaintiff identified the tied product the lower court record was criticized for failing to identify an effect in the tied product market. 466 U.S. at 29-30. Without a lower court record identifying the tying product or the tied product, Pet. App. A-19, it is impossible for this Court to analyze WCCO's tying claim.

desired to purchase only one of two allegedly tied products, but not the other. To make the argument WCCO misrepresented the facts to this Court by failing to reveal in its petition its bid for both Twins' and North Stars' pay TV rights. It was the concealment of that crucial fact by WCCO that was necessary to prevent this Court from understanding that WCCO wanted the pay TV rights for both the Twins and North Stars.

The tying claim, quite simply, had no merit from the start because WCCO was out-bid for the year-round pay TV sports programming product. Both WCCO and Spectrum bid for the combination of Twins' and North Stars' rights. To invite tampering with the bidding process for both teams by inviting antitrust actions by well-heeled losing bidders is to displace the workings of free markets, not to support them.

9. Finally, WCCO argues that it did not want to dismantle Spectrum, and that it merely objected to the bidding process. That simply, on the record, is not the case. WCCO sought not only to have tying prohibited between the Twins and North Stars; it also wanted Twin Star and Sports Channel dismantled. Pet. App. A-41, 46 (District Court denying WCCO's request for broad injunctive relief). WCCO's objection was not so much to the bidding process as to the existence of a new competitor in the marketplace.

III.

THIS CASE DOES NOT PRESENT FACTS APPROPRIATE TO DETERMINE THE QUESTION OF WHETHER POTENTIAL PURCHASERS MAY HAVE ANTITRUST STANDING TO RECOVER DAMAGES DUE TO AN UNLAWFUL TYING ARRANGEMENT

1. As discussed above, only foreclosed competitors in the tied product market and purchasers of the tied product have standing to sue for tying violations. WCCO's assertion of tying damages standing attempts to equate actual purchasers with potential purchasers under the rubric of customer. Since WCCO never purchased the allegedly tied product, in addition to never identifying it at trial, it was never injured by an unlawful tying agreement. WCCO was not frozen out of purchasing Twins' and North Stars' pay TV rights by a restrictive tying practice; someone else simply bought the property. The loss, if any, to WCCO was caused by the decision of another buyer to pay more than WCCO, or, as the Court of Appeals noted, WCCO's decision not to up its bid. Pet. App. A-8.

2. This Court in *Associated General Contractors* articulated six factors to be considered before enforcing a party's antitrust claim: (1) the causal connection between the alleged antitrust violation and the harm to plaintiff; (2) improper motive; (3) whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness between the injury and the market restraint; (5) the speculative nature of the damages; and (6) the risk of duplicate recoveries or complex damage apportionment. 459 U.S. at 537-44. The *Associated General Contractors* factors regarding antitrust standing support the long line of

cases before this Court that have limited antitrust standing for tying claims to actual purchasers or foreclosed competitors. *See generally Loew's*, 371 U.S. at 44-45.

3. The damages of an actual purchaser of a tied product are the excessive charge in the tied product market that would not have occurred except for the economic power in the tying product market. *See Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir. 1982); *Heatransfer Corp v. Volkswagenwerk, A.G.*, 553 F.2d 964, 984-85 (5th Cir. 1977). Any damage calculation by WCCO based on a tying violation could not even approach such specificity.

WCCO's alleged damages for the tying claim is that it was denied the pay TV rights for the Twins' and North Stars' games, and, consequently it lost a business opportunity.[9] Even if WCCO lost the business opportunity of Twins' and North Stars' pay TV rights because of an antitrust tying violation, the damages are wholly speculative because WCCO is not in the class of persons for whom specific tying damage calculations can be made. Awarding WCCO damages for WCCO's loss of the business opportunity of Twins and North Stars pay TV rights, allegedly because of a tying violation, would merely be speculation concerning the level of profits, if any, that such a business opportunity would give to WCCO.

4. Even worse than the speculative nature of the damages for a lost fledgling business opportunity tangentially related to an alleged antitrust violation is the risk of dupli-

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[9]This damage calculation theory demonstrates that it is not antitrust injury being imposed on WCCO. Rather, it is that WCCO lost the business opportunity by being out-bid for the Twins' and North Stars' pay TV rights. The same economic effect to WCCO, i.e. no revenue or potential profits from pay TV rights of Twins and North Stars, would occur whenever another entity out-bids WCCO.

cate recoveries. WCCO alleges a lost business opportunity for the pay TV rights of the Twins and North Stars, but Movie Systems, Inc (the first bidder for North Stars' pay TV rights) also arguably suffered a lost business opportunity.

Any one of a multitude of "potential purchasers," *i.e.* potential users of the supply of Twins' and North Stars' pay TV rights, could come out of the woodwork to sue the Twins and Northstars for the same lost business opportunity. It is for that reason that tying violations limit damage recoveries to actual purchasers. Everyone who did not purchase the tied product is a potential purchaser and thereby entitled to damages under the global theory offered by WCCO. The risk of duplicate recovery, acknowledged to be a significant factor by this Court in *Associated General Contractors*, precludes the expansion of antitrust standing for tying damages to those other than actual purchasers.

IV.

THIS CASE GENERALLY IS NOT WORTHY OF THE EXERCISE OF THE DISCRETIONARY AUTHORITY OF THE COURT

1. A petitioner for a writ of certiorari has an obligation of presenting special and important reasons for the discretionary grant of this Court's review of the case. Supreme Court Rule 17.1. In opposition to a petition for certiorari, respondents are obligated to set forth any matter or ground why the cause should not be reviewed by the Court. Supreme Court Rule 22.1. Although not explicitly falling within the distinct categories of the three proposed certiorari questions presented by WCCO, the following gen-

eral information precludes this case from having the special importance required for discretionary review by this Court.

2. A significant part of this case is moot because of the settlement agreements entered into between the Twins and WCCO. Resp. App. A-13-14. The Court simply should not review a case that for the most part has been resolved by the parties.

3. This Court should not disregard the variety of problems the Court of Appeals found in the antitrust claims of WCCO in addition to the lack of standing. The three problems found by the Court of Appeals were: (1) no allegation of any claim of injury to competition in any defined, relevant product or geographic market; (2) the level of competition probably increased when Spectrum won the bid for the local pay TV rights of Twins' and North Stars' games; and (3) WCCO failed to identify a tied or tying product. Pet. App. A-18-19. The Court of Appeals concluded by stating that, "In short, we seriously doubt that WCCO made a sufficient tying case to warrant submission of this claim to the jury." Pet. App. A-19. Thus, any remand of this case to the Eighth Circuit based on any clarification of antitrust standing would be of little use to other cases because the Eighth Circuit has indicated its intent probably to dismiss this case on other grounds.

4. The flaws in the antitrust case of WCCO are a result of another distinguishing feature of this case: this case comes to the Court after a two-month trial rather than after a pretrial determination of standing by a district court. If the Court uses this case as a vehicle to clarify antitrust standing requirements, the case will be generally distinguished by the numerous facts developed at trial, including

but not limited to the specific antitrust defects pointed out by the Court of Appeals. Pet. App. A-19. Therefore, certiorari to clarify antitrust standing principles is not appropriate for this case.

5. The District Court noted that the products involved precluded an early determination of the standing issue. Pet. App. A-42 n.1 ("The unique nature of the market precluded an early resolution of the standing issue at trial."). This case is not one in which a manufacturer is selling hundreds or thousands of products over a period of time, each one tied to another product without regard to the buyer's preference. This case involves a single transaction where the teams, faced with a chance to make a package deal to a buyer who clearly wanted the whole package, wanted to test the market to see if the *legal* package deal with Spectrum was the best they could get. *Jefferson Parish,* 466 U.S. at 25; *see Northern v. McGraw-Edison Co.,* 542 F.2d 1336, 1345 (8th Cir. 1976), *cert. denied,* 429 U.S. 1097 (1977).

The classic tying cases involve multiple products tied over a period of time. *See International Business Machines Corp. v. United States,* 298 U.S. 131 (1936) (IBM machines tied to use of IBM cards). This case is different. It was the unique character of the product involved, *i.e.* television rights, that precluded an early standing decision by the District Court. It is that same uniqueness of the product involved that precludes this case from being of special importance or general applicability such that it is a desirable vehicle for the Court to clarify any problem that may exist in general antitrust standing requirements. Therefore, certiorari should not be granted.

CONCLUSION

For the reasons stated in this brief, the petition for writ of certiorari should be denied.

Respectfully submitted,

Peter S. Hendrixson (Counsel of Record)
Marianne D. Short
Kevin W. Rouse
DORSEY & WHITNEY
2200 First Bank Place East
Minneapolis, MN 55402
(612) 340-2600
Counsel for Respondents Minnesota Twins, Inc. and Minnesota Subscription Television, Inc., d/b/a Spectrum

Timothy D. Kelley
Mackall, Crounse & Moore
1600 TCF Tower
121 South 8th Street
Minneapolis, MN 55402
(612) 333-1341
Counsel for Respondents North Star Hockey Partnership and Twin Star Enterprises

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Midwest Communications, Inc.,

Plaintiff,

vs.

Minnesota Twins, Inc., Northstar Hockey Partnership, Twinstar Enterprises, a general partnership, Minnesota Subscription Television, Inc., d/b/a Spectrum, and Sports Channel, a Minnesota joint venture,

Defendants.

MEMORANDUM AND ORDER
Civ. 3-82-1729

Plaintiff moves for a preliminary injunction to preclude joint marketing by the defendants of the telecast rights to Minnesota Twins games and to prevent them from representing to other persons that they have put together a broadcast package including Twins telecast rights. Leon R. Goodrich, Esq. appeared for plaintiff. Peter Dorsey, Esq. appeared for the Minnesota Twins, Inc. Timothy D. Kelly, Esq. appeared for Northstar Hockey Partnership and Twinstar Enterprises. John M. Degnan, Esq. Appeared for Sports Channel and for Minnesota Subscription Television, Inc., d/b/a Spectrum.

I.

FACTUAL BACKGROUND

This suit arises out of the marketing of broadcast rights to certain games of the Minnesota Twins, a professional baseball team owned by defendant Minnesota Twins, Inc. ("Twins"), and the Minnesota North Stars professional hockey team, operated by defendant Northstar Hockey Hockey Partnership ("North Stars")[1].

Over three years ago, on January 11, 1980, the Twins entered a four-year agreement with Midwest Federal Savings and Loan Association ("Midwest Federal"), granting Midwest Federal radio broadcast rights to all Twins games and commercial over-the-air telecast rights to certain road and home games. *See* Affidavit of William S. Robertson. Exhibit A. Expecting pay television to break into the local market before the expiration of the 1989 agreement, Midwest Federal also purchased a "right of first refusal" to be triggered by an offer by a pay television broadcaster to telecast certain Twins home games during 1983 and 1984. The agreement states in relevant part:

> In the event that the Club receives from another person, firm or corporation a bona fide offer which it is willing to accept . . . for the right to broadcast League Games in the State of Minnesota, South Dakota, North Dakota, Wisconsin and/or Iowa during 1983 or 1984 by means of cable, closed circuit, pay or community antenna television, then the Club shall immediately give written notice thereof to the Company, including in said notice all of the terms and con-

[1]GBRSC, Inc. is a licensee of the Northstar Hockey Partnership for certain broadcast rights. GBRSC, Inc. and the Northstar Hockey Partnership will be referred to jointly here as the "North Stars".

> ditions of said offer including, but not limited to, the price, method of payment and description of the radio and television rights to be granted. The Company shall have ten (10) days after receipt of said written notice to elect to enter into an agreement with the Club for such broadcast and television rights on the same terms and conditions set forth in such notice.

Affidavit of William S. Robertson, Exhibit A, para. 23.

In 1981, the North Stars began investigating the local market for pay television of their home games, hoping to duplicate the success of other NHL teams. Believing that successful pay sports channels feature year-around programming, the North Stars spoke with Twins representatives about forming a partnership to provide year-around sports programming in Minneapolis-St. Paul and the surrounding region.

In July of 1982, Minnesota Subscription Television, Inc. (hereafter "Spectrum"), a subscription television company new to Minneapolis-St. Paul, presented a proposal to the Twins and North Stars to form a joint venture to market pay telecasts of both teams' home games. Shortly thereafter, plaintiff Midwest Communications, Inc. ("WCCO"), the owner of WCCO Radio and WCCO TV, met with the Twins and North Stars and stated that they were planning a cable sports network and wanted to make a proposal for pay telecast rights to Twins and North Stars games.

WCCO's proposal came in September of 1982. They "envision[ed] a full equity partnership among the Twins, North Stars, and the Upper Midwest's pre-eminent and most successful broadcaster—WCCO." Affidavit of William S. Robertson, Introduction in Exhibit B, Tab A, para. 3. All three participants would receive one-third of the revenues.

After comparing the two offers, the Twins and North Stars found the WCCO offer to be inferior. Mr. Karr, North Stars' president, recounts how he told WCCO that it could increase its offer to match the terms proposed by Spectrum. Affidavit of John F. Karr, para. 3(a). While the parties disagree over which package was truly most attractive to the Twins and North Stars, the two clubs opted for Spectrum. On September 22, 1982, a letter of intent was signed by the clubs and Spectrum, with notice of right-of-first refusal sent to Midwest Federal.

On October 1, 1982, Midwest Federal requested additional information from the Twins and an extension of the 10 day period within which Midwest Federal could exercise its right. The Twins granted the request, moving the due date to October 15, 1982.

On October 14, 1982, WCCO purportedly purchased an assignment of the right-of-first refusal from Midwest Federal. Their agreement includes the conveyance of Midwest Federal's "causes of action with respect to exercise of said right-of-first refusal." Complaint, para. 56. One day later, Midwest Federal notified the Twins of its election to make an offer pursuant to its right-of-first refusal. As with WCCO's earlier proposal, the Twins rejected this offer for the marketing of Twins telecasts by WCCO.

The decision of the two clubs to go with Spectrum spawned Twinstar Enterprises, a general partnership between the Twins and North Stars, formed to market broadcast rights to the two teams' games in the Upper Midwest. At the same time, Twinstar and Spectrum formed a partnership to telecast sports programming, called Sports Channel.

In its complaint, filed on December 3, 1982, WCCO claims that the distribution of the pay television rights to

Twins and North Stars games violated the federal and state antitrust laws and involved breach of contract as well as tortious conduct inducing the breach of contract and interfering with contractual relations. Twenty-seven days later, this Court heard and denied plaintiff's motion for a temporary restraining order, but provided plaintiffs with an expedited hearing date on this motion for a preliminary injunction.

II.

DISCUSSION

The standard to be applied by this Court in determining whether an injunction should issue was recently established in this circuit by *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981):

> [W]hether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.[2]

The Court recognizes that it cannot woodenly apply these factors. "At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Id.* at 113.

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[2] 15 U.S.C. §26 (1982) adds that the movant for a preliminary injunction in an antitrust case must show that the danger of irreparable harm is "immediate".

A. *Threat of Harm to the Parties*

WCCO contends that it sues as an infant in the highly competitive pay television industry and that to allow Spectrum to continue to offer a tandam package of Twins and North Stars' home games on pay television will allow Spectrum to entrench itself in the local sports programming market, leaving it extremely difficult for WCCO to compete even if the Twins telecast rights are ultimately awarded to WCCO. While WCCO may suffer commercial injury, the threatened harm is not irreparable, nor does it outweigh the potential injury to the defendants.

First, WCCO argues that the threatened loss of its potential competitive position justifies the relief requested. This Court disagrees. While WCCO may lose potential market share, the remedy at law of damages is adequate. In the subscription television industry, more so than most, competitors are well aware of the identities of the cable operators, the number of households receiving subscription signals and even the demographics of the market. Prices are fairly standardized throughout the country. As a result, damages are quite capable of calculation.

But more importantly, the harm an injunction would inflict on defendants outweighs that imposed on WCCO. Sports Channel, the joint sports programming venture between Twinstar and Spectrum, has expended substantial capital to break into the local television market. All of Spectrum's nearly 6,000 Sports Channel sales have been on the representation that Twins games will be presented in 1983. Affidavit of John F. Karr, para. 17. An injunction could lead to loss of reputation and good will from which the newcomer could never recover.

WCCO retorts that it will suffer the greater loss of reputation and good will in the industry and with the viewing public because of a perceived inability to acquire rights to "major league" entertainment and the lost opportunity to build good will with pay television operators who contract with Spectrum instead. This Court doubts that denial of WCCO's motion would undermine the reputation and good will of one of this region's leading broadcasters. If an established broadcaster such as WCCO later obtains telecast rights to the Twins it could surely win back customers who turned to Spectrum for telecasts, particularly since those customers subscribe on a month-to-month basis. Pay television operators would be just as quick to switch to the established WCCO organization once it obtained telecast rights. On the other hand, if this Court blocked Spectrum's marketing strategy, its demise could be imminent.

The harm inflicted by an injunction, moreover, would tempoarily deprive the Twins of revenues generated by the marketing of its ball games. The Twins, unlike many professional franchises, stand in need of additional capital.

B. *Probability of Success on its Merits*

"The strength of this showing varies depending on the weight of the other three elements listed in *Dataphase* but absent some showing of probability of success an injunction will not issue." *Sperry Corp. v. City of Minneapolis*, 680 F.2d 1234, 1238 (8th Cir. 1982), *citing Dataphase*, 640 F.2d at 113. Since this Court concludes that the chance of irreparable injury to WCCO should relief be denied is outweighed by the likely injury to the other parties should the injunction be granted, WCCO faces a heavy burden of demonstrating that it is likely to prevail on the merits. *See*

Dataphase, 640 F.2d at 113. WCCO has not met this burden.

First, WCCO claims that the defendants formed a contract or combination in restraint of trade proscribed by federal and state antitrust law. It contends that the Twins and North Stars designed Twinstar to maximize revenues by restricting competition in the sale of telecast rights. Its position does not justify the relief requested. Before a combination constitutes an illegal restraint of trade, an agreement must be found between competitors. Horizontal restraints by definition require agreements between competitors. *See, e.g., Evans v. S.S. Kresge Co.*, 544 F.2d 1184, 1192 (3d Cir. 1976), *cert denied*, 433 U.S. 908 (1977). The Twins and North Stars, however, engage in different sports with different seasons.[3]

For that reason, plaintiff's reliance on *Board of Regents of the University of Oklahoma v. N.C.A.A.*, 1982-2 CCH Trade Cases ¶64,943 (W.D.Okla. 1982) and *United States v. Columbia Pictures Industries*, 507 F.Supp. 412 (S.D. N.Y. 1980), aff'd — F.2d —, (2d Cir. 4/7/81) (a do-not-publish order) is misplaced. In the *N.C.A.A.* case, member schools pooled broadcast rights for teams playing the same sport during the same season. Similarly, in *Columbia Pictures*, four motion picture producers combined to market films formerly in direct competition for the public eye. Here, even though the defendants freely admit they intended to increase revenue, the Twinstar concept evolved because the two clubs produced complementary, not competitive, products. *See* Affidavit of William S. Robertson at 16.

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[3]The two seasons of these two sports do overlap somewhat. The schedules show 78 days of overlap in five years; all the overlap is in the spring in years when the North Stars are in the playoffs. In 1978 and 1979, there was no overlap and in 1982 there was six days of overlap.

The Court does not assume that just because the Twins and North Stars play different sports, they are not in competition wth each other in the sale of their telecast rights. On the other hand, however, WCCO has not shown that the Twins and North Stars are substitute anchors competing to chain the same pay television audience to a particular channel.

WCCO also argues that the two clubs refused to separately sell the broadcast rights to their respective games. That is, any entity desiring to obtain the telecast rights to either the Twins or North Stars games must purchase the rights to both. This marketing strategy, WCCO contends, runs afoul of the Sherman Act's proscription against tying and constitutes dishonor of Midwest Federal's right-of-first refusal.

This Court agrees that the Twins could not be required to match the package offer by Spectrum. The record, however, is unclear as to whether WCCO had to include North Stars telecasts in its offer. On October 1, 1982, Midwest Federal inquired as to the terms and conditions under which the Twins would enter into an agreement to broadcast Twins games only. Affidavit of William S. Robertson, Exhibit E, p. 1. The Twins response, sent on October 5, 1982, contained the following language:

> The Twins recognize that any proposed agreement to be submitted by Midwest for the telecasts of the Twins games cannot, and is not required to, contain exactly the same terms and conditions as those contemplated by the Twins proposed partnership with the North Star Hockey Partnership (the "North Stars"), to be known as Twinstar Enterprises ("Twinstar"), or as those contemplated by the proposed joint

venture (referred to herein as "Sport Channel") to be formed by the Minnesota Subscription TV, Inc. ("Spectrum") and Twinstar, and that Midwest's offer may, in certain respects, differ.

At this time, the Court is not convinced that the Twins compelled Midwest Federal to tie North Stars' programming into its proposal, but they did require that WCCO's telecasts of Twins games be as attractive for the Twins as the returns under the Spectrum package. While WCCO may ultimately convince this Court that the Twins' actions constitute dishonor of its agreement with Midwest Federal, probability of success on this issue does not, by itself, justify injunctive relief.

C. *The Public Interest*

Plaintiff delayed in coming before this Court to challenge the means used by Spectrum to break into the area's pay television market. Over five thousand Sports Channel subscribers and two cable networks have already purchased the Spectrum package. To alter their expectations before these issues are adjudicated could well disrupt rather than preserve the status quo. Since Spectrum has obtained but a toehold in the broadcast market of this region, this Court finds the possible demise of Spectrum and the enhanced entrenchment of WCCO to be of legitimate concern and therefore, at this time, refuses to turn back WCCO's competition.

Furthermore, the Twins' fans must be considered. It is hardly to be in the public interest to deprive them of Twins pay television until this case is finally decided.

Based upon the foregoing, the record, the arguments and

briefs of counsel, IT IS HEREBY ORDERED that plaintiff's motion for a preliminary injunction is denied.

In order to minimize the possibility of commercial injury to WCCO, IT IS ALSO ORDERED that this case is to be ready for trial on or after April 25, 1983.

Dated: January 19, 1983.

/s/ ROBERT G. RENNER
United States District Judge

MIDWEST COMMUNICATIONS INC.
11th on the Mall
Minneapolis, MN
55403

JAMES M. RUPP
President &
Chief Operating Officer
(612) 330-2660

July 20, 1984

Mr. Carl R. Pohlad,
President
F&M Marquette National Bank
777 Marquette Avenue
Minneapolis, MN 55480

Dear Carl:

This will confirm what Tom Doar and I told you during our meeting the other day and again on the telephone this morning.

If you buy the Minnesota Twins, we will drop our claim for damages (not attorney fees and costs and not injunc-

tive relief) against the Twins (not the North Stars) that is included in the lawsuit presently on appeal to the Eighth Circuit.

With best regards,

/s/ James M. Rupp

JMR/j

cc: W. T. Doar, Jr.

CARL R. POHLAD
400 Marquette Hotel Building
710 Marquette Avenue
Minneapolis, MN 55402
(612) 339-8853

July 30, 1984

Mr. James M. Rupp
President
Midwest Communications, Inc.
11th On The Mall
Minneapolis, Minnesota 55403

Re: Minnesota Twins, Inc.

Dear Jim:

I thank you for you letter concerning the dropping of your claim for damages, but not attorneys' fees, costs or the claim for injunctive relief, against the Twins in the lawsuit presently on appeal to the Court of Appeals. We appreciate your good faith gesture as a part of the community support which has been given to enable the Twins to remain in Minnesota.

As we discussed a few days ago, the Twins could still be exposed to damages as a partner in the partnerships which are also defendants in the suit. You have indicated that in such eventuality your company would reimburse the Twins in the amount of damages (not attorneys' fees and costs) for which the Twins are responsible.

Please confirm our understanding by signing where indicated below.

With best regards,

Very truly yours,
/s/ Carl K. Pohlad

Agreed to this 30th day
of July, 1984.

MIDWEST COMMUNICATIONS, INC.
By /s/ James M. Rupp
James M. Rupp, President

CRP/ls

(3)

Supreme Court, U.S.
FILED
MAY 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1649

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MIDWEST COMMUNICATIONS, INC.,

Petitioner,

v.

MINNESOTA TWINS, INC.; NORTHSTAR HOCKEY PARTNERSHIP; TWINSTAR ENTERPRISES, A GENERAL PARTNERSHIP; MINNESOTA SUBSCRIPTION TELEVISION, INC., D/B/A SPECTRUM; AND SPORTS CHANNEL, A MINNESOTA JOINT VENTURE;

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

LEON RAYMOND GOODRICH
(Counsel of Record)
BRADLEY G. CLARY
MARKO J. [illegible]RKONICH
OPPENHEIMER WOLFF FOSTER SHEPARD AND DONNELLY
1700 First Bank Building
Saint Paul, Minnesota 55101
(612) 227-7271
Counsel for Petitioner Midwest Communications, Inc.

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[1] Pursuant to Supreme Court Rule 28.1, petitioner, Midwest Communications, Inc. (now known as Midwest Communications Operating Company), states that its parent company is MTC Properties, Inc. (now known as Midwest Communications, Inc.), and that it has no subsidiaries (excluding wholly owned subsidiaries) or affiliates, except that one subsidiary has an interest in Satellite Music Network, Inc. and another subsidiary is a partner in Satellite Radio Network Partnership.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1649

MIDWEST COMMUNICATIONS, INC.,

Petitioner,

v.

MINNESOTA TWINS, INC.; NORTHSTAR HOCKEY PARTNERSHIP; TWINSTAR ENTERPRISES, A GENERAL PARTNERSHIP; MINNESOTA SUBSCRIPTION TELEVISION, INC., D/B/A SPECTRUM; AND SPORTS CHANNEL, A MINNESOTA JOINT VENTURE;

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

INTRODUCTION

The Joint Brief for Respondents in Opposition ("Joint Brief"), in its own formulation of the Questions Presented at Page i, concedes that this case raises important and substantial antitrust questions. The Joint Brief, however, seeks to convince the Court that this is not the case in which to decide

those questions. To this end, the Joint Brief misstates certain facts and principles.

The purpose of this Reply Brief is to set the record straight. This is the case in which to decide the questions presented.

ARGUMENT

1. Respondents' essential (but erroneous) description of the case is that their conspiracy consisted only of a *single* transaction in 1982 in which Midwest Communications, Inc. ("WCCO") at one point *willingly* bid for both the telecast rights of the Minnesota Twins, Inc. baseball team ("Twins") and the Northstar Hockey Partnership hockey team ("North Stars") and that Spectrum ultimately *outbid* WCCO. (Joint Brief, pp. 2-4).

   WCCO's reply to this contention is as follows:

   a. At page 16 of the Joint Brief respondents concede that their illegal pooling arrangement is not simply for a single transaction but exists for 20 years until the year 2002.

   b. WCCO never willingly bid for a package of both Twins and North Stars rights. At one time, it bid for both Twins and North Stars rights because it was *told* to do so by the Twins and North Stars as part of the tying violation. (See Testimony of James Rupp, Vol. I, pp. 6, 63, 8th A 1140-1141; Vol. III, p. 197, 8th A 1150). Then when WCCO had an opportunity to bid for Twins rights only under the Midwest Federal right of first refusal contract, it did so. The single most important reason for the rejection of this later bid was the fact that WCCO did not also bid to purchase North Stars' pay telecast rights. (Pl. Exh. 146 at p. 2, 8th A 570). Re-

spondents made the argument to the jury that WCCO willingly bid for both Twins and North Stars rights. The jury rejected that construction of the true facts and found unlawful tying. (Special Verdict, Questions 6, 7, 8, and 11—Petition A-48 - 50).

c. In any event, whether Spectrum outbid WCCO is irrelevant. WCCO was forced to participate in a tainted competition where it was not allowed to compete separately for Twins and North Stars rights. Since the process itself was tainted by antitrust pooling and tying violations, WCCO's injury in failing to obtain Twins telecast rights is an "antitrust" injury.

d. WCCO should not be forced now to make a new offer to purchase from a continuing illegal conspiracy. What WCCO seeks in this case is injunctive relief so that it will not be compelled to deal with a pooling arrangement that a jury has already found is a conspiracy among competitors in unreasonable restraint of trade. The alleged failure of WCCO to date to make a new purchase offer after Spectrum's recent demise emphasizes the need for relief rather than rendering the case moot.[2]

2. Respondents attempt six other arguments in an effort to muddy the record. All are readily countered.

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[2] Similarly, this case is not mooted by WCCO's recent accommodation with the Twins to permit a transfer in the Twins' ownership. WCCO expressly reserved its claim for injunctive relief against the Twins. (Joint Brief, pages A-11 - 12). Further, WCCO expressly reserved all damages and injunctive claims against the North Stars. (Joint Brief, pages A-11 - 12). The North Stars are jointly and severally liable for damages for all injury to WCCO.

a. Respondents raise questions about WCCO's substantive antitrust proof. These arguments were expressly rejected by the District Court. The Eighth Circuit expressly did *not* reverse the District Court on these points, and the jury findings of violation are wholly intact. For purposes of this Petition, respondents' antitrust violations are given.

b. Respondents say there is no conflict in the Circuits regarding the applicability of the "antitrust injury" requirement set forth in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) to injunctive claims under Section 16 of the Clayton Act, 15 U.S.C. § 26 (1982). In making that contention, the respondents fail to consider properly the opinions in *Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570 (10th Cir. 1985), *cert. granted* 106 S.Ct. 784 (1986) (No. 85-473) and *Tim W. Koerner & Assoc. v. Aspen Labs, Inc.*, 492 F.Supp. 294 (S.D. Tex. 1980), *aff'd* 683 F.2d 416 (5th Cir. 1982). The courts in both of those cases applied a proximate cause test to injunctive claims, requiring only that the plaintiff show that threatened injury was proximately caused by the violation without reference to "antitrust injury".

These holdings have their basis in *Brunswick*. This Court in *Brunswick* expressly rejected the notion that to recover *damages* a plaintiff had to show only a violation and injury proximately caused by the violation. This Court instead found that, to recover *damages*, a plaintiff has to "prove more than injury causally linked to an illegal presence in the market." 429 U.S. at 489. This Court in *Brunswick* nevertheless permitted the plaintiffs to proceed with their injunctive claim based

on that theory of proof. As the Court of Appeals for the Tenth Circuit stated in *Monfort*:

> In a section 16 case, *Brunswick* mandates only an inquiry into the causal connection between the threatened injury and the putative antitrust violation . . . The Supreme Court has said that this causation inquiry is like proximate cause analysis. See Blue Shield, 457 U.S. at 477, 102 S.Ct. at 2547; Associated General Contractors, 459 U.S. at 535-36, 103 S.Ct. at 907-08.

761 F.2d at 574.

Similarly, in *Tim W. Koerner & Assoc.*, the District Court first expressly distinguished between a proximate cause requirement and an antitrust injury requirement. 492 F.Supp. at 300. The court then held that both elements were required for standing under Section 4 of the Clayton Act, but only the proximate cause part of the requirement was required for standing under Section 16. For injunctive cases under Section 16, the court held:

> The pivotal issue for standing under section 16 is proximate cause. The Plaintiff must demonstrate that he is threatened with loss or injury proximately resulting from the antitrust violation. Id. The analysis of proximate cause under section 4, as set forth above, [as distinguished from the analysis of antitrust injury under *Brunswick*] is also applicable to section 16.

492 F.Supp. at 300-301.

These rulings stand in direct conflict with the opinion of the Eighth Circuit in this matter.

c. Respondents say that WCCO was recently able to obtain Twins radio rights. Of course, the TwinStar pooling contract only covered *telecast* rights. Indeed, the jury defined the relevant market in this case solely in terms of telecast rights. (Special Verdict Question 1—Petition A-47). The fact that WCCO was able to separately compete to purchase radio rights is hardly an excuse for TwinStar. Radio rights are not a part of TwinStar but, rather, are sold by the Twins without any involvement of the North Stars.

d. Respondents say that WCCO has driven Spectrum from the market with this litigation. (Joint Brief, page 14, footnote 5). To the contrary, Spectrum remained in business throughout the litigation and, of course, in March 1984 the District Court removed the injunction against the teams which prohibited their tying. Spectrum did not cease its broadcasting of pay TV sports until the fall of 1985. (Joint Brief, pages 5, 6).

Further, when WCCO filed this lawsuit, the teams and Spectrum asserted a series of counterclaims against WCCO. In response to these counterclaims, the jury expressly found that WCCO did not interfere with the business relations of or cause damage to the North Stars, Spectrum, the Twins, Sports Channel, or TwinStar. (Special Verdict Questions 20, 22, 24, 26, and 28—Petition, pages A-51 - A-53).

e. Respondents say the District Court never found any threatened injury to WCCO by respondents' antitrust violation. To the contrary, the District Court by definition found there *was* a threat when it initially granted WCCO injunctive relief in September, 1983. There is no deficiency in the record on this point. The problem

is that the District Court later misapplied this Court's decision in *Brunswick* to the claims for injunctive relief. That misapplication should be reviewed.

f. Respondents say this case will not have general applicability because it comes to the Court following trial and is fact specific. To the contrary, this is the case where the questions presented should be addressed, because a jury on a fully developed record has already found a price-fixing and tying conspiracy among horizontal competitors in the sale of telecast rights. The Court therefore need engage in no speculation regarding the evils of the arrangement. Professional sports teams and broadcast entities around the country are looking to the outcome of this case to see whether narrow application of standing rules is going to protect the formation of such conspiracies concerning telecast rights.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit.

Dated: May 19, 1986.

Respectfully submitted,

LEON RAYMOND GOODRICH
(Counsel of Record)
BRADLEY G. CLARY
MARKO J. MRKONICH
OPPENHEIMER WOLFF
FOSTER SHEPARD AND
DONNELLY
1700 First Bank Building
Saint Paul, Minnesota 55101
(612) 227-7271
Counsel for Petitioner
Midwest Communications, Inc.